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APPENDIX

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JOHN F. DAVIS, CL

Supreme Court of the United States

October Term, ~~1968~~ 1969

No. ~~976~~ 41

THE CHOCTOW NATION AND THE CHICKASAW NATION,
Petitioners,

v.

STATE OF OKLAHOMA, ET AL.,
Respondents.

No. ~~1104~~ 59

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

v.

STATE OF OKLAHOMA, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI IN NO. ~~976~~ 41 FILED JANUARY 25, 1969
PETITION FOR CERTIORARI IN NO. ~~1104~~ 59 FILED MARCH 3, 1969
CERTIORARI GRANTED APRIL 21, 1969

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Order Granting Stay of
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[Filed December 9, 1966]

IN THE UNITED STATES COURT IN AND FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 6219

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Plaintiff,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO. OF CALIFORNIA; AND YAHOLA SAND AND GRAVEL CO., A CORPORATION,

Defendants.

COMPLAINT

I.

Jurisdiction of this Court is invoked under Section 18, Paragraph 2 of the Act of April 26, 1906, (34 Stat. 137). 318 U.S. 629, 640.

II.

This action will involve the construction, interpretation and application of the Constitution of the United States, Article II, Section I, Amendments V and XIV, Section I; Cherokee Treaty of Washington, D.C., May 6, 1828, Articles II, III, 7 Stat. 311, 2 Kapp. 288; Act of May 28, 1830, 4 Stat 411; Cherokee Treaty of Ft. Gibson, February 14, 1833, Article I, 7 Stat. 414, 2 Kapp. 385; Cherokee Treaty of New Echota, Cherokee Nation east, December 29, 1835, Articles II, III, V, and VI, 7 Stat. 478, 2 Kapp. 439; Cherokee Treaty of Washington, D.C., July 19, 1866, Articles XI, XIV, XV, XVI, XVII, XX, XXII, XXIII, XXVI, XXVII, and XXXI, 14 Stat 799; Choctaw Treaty of Doak's Stand, October 18, 1820, Articles II and III, 7 Stat. 210; Choctaw Treaty of Washington, D.C., January 20, 1825, Preamble and Articles I and II, 7 Stat. 234; Choctaw Treaty of Dancing Rabbit Creek, Article II and XI, September 22, 1830, 7 Stat. 333; Choctaw and Chickasaw Treaty of Washington, D. C., June 22, 1855; Act of May 2, 1890, Section 31, 26 Stat 81; Act of July 1, 1902, Section 64, 32 Stat. 716; Act of April 26, 1906, Sections 11, 17, 18, 27 and 28, 34 Stat 137; Act of June 16, 1906, Section I, 34 Stat. 267; Constitution of the State of Oklahoma, Article I, Section 3; Article II, Section 7, adopted in Convention at Guthrie, July 16, 1907, ratified September 17, 1907, put in force November 16, 1907.

III.

The Cherokee Nation from December 29, 1835 to April 26, 1906, was the absolute fee title owner of certain lands hereinafter more particularly described within the present State of Oklahoma and commonly referred to as the bed and banks of the navigable portion of the Arkansas river within said State; that is to say that part of the bed and banks of said river lying below

the mean level of the high water mark upon said banks, from a point on said river in present Muskogee County, Oklahoma, beginning at the confluence of Grand river with said Arkansas river, downstream to the confluence of the Canadian river, and to the north bank thereof, and thence down said Arkansas river along the center of its main channel to the State line of Arkansas; that said fee title of said Cherokee Nation was derived as follows:

In accordance with the desire of the United States, as expressed in the following preamble of the Treaty of May 6, 1828, between the Western Cherokees and the United States (7 Stat. 311, 2 Kapp. 288):

> "WHEREAS, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *"

the Cherokee Nation exchanged its aboriginal domain in the east for a domain west of the Mississippi River, located in what was then known as Indian Territory, now constituting a part of the State of Oklahoma; and the United States agreed to issue a patent to the Cherokee Nation for said western domain embodying the above quoted guarantee (Treaty of May 6, 1828, Arts. 2,

3, 7 Stat. 311, 2 Kapp. 288; Act of May 28, 1830, 4 Stat. 411; Treaty of February 14, 1833, Art. 1, 7 Stat. 414, 2 Kapp. 385; Treaty of December 29, 1835, Arts. 2, 3, 5, 6, 7 Stat. 478, 2 Kapp. 439.)

IV.

On December 31, 1838, a patent was duly issued and recorded in the General Land Office conveying to the Cherokee Nation certain tracts of land therein set forth, containing in all 14,374,135.14 acres. The patent states in its preamble that the conveyance is made by the United States in consideration of the promises contained in said Cherokee Treaties of 1828, 1833 and 1835, and further provides:

> "And Whereas, the United States have caused the said tract of seven millions of acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows:
>
> "Beginning at a mound of rocks four feet square at base and four and a half feet high, from which another mound of rocks bears South one chain, and another mound of rocks bears West one chain, on what has been denominated the old western territorial line of Arkansas Territory; twenty five miles north of Arkansas river; thence South twenty one miles and twenty eight chains, to a post on the north east bank of the Verdigris river, from which a hackberry, fifteen inches diameter, bears South sixty one degrees thirty one minutes East, forty three links, marked C.H.L. and a Cotton wood forty two inches diameter bears South twenty one degrees fifteen minutes, east fifty links marked C.R.K.L.; thence down the Verdigris river, on the Northeast bank, with its meanders, to the junction of Verdigris and Arkansas river, thence from the lower bank of Verdigris river, on the north bank of Arkansas

river, South forty four degrees, thirteen minutes, East fifty seven chains, to a post on the south bank of Arkansas, opposite the eastern bank of Neosho river, at its junction with Arkansas, from which a red oak, thirty six inches diameter, bears South seventy five degrees, forty five minutes West, twenty four links and a hickory, twenty four inches diameter, bears South eighty nine degrees East, four links; thence South fifty three degrees west, one mile to a post, from which a rock bears North fifty three degrees East, fifty links and a rock bears South eighteen degrees, eighteen minutes west fifty links; thence South eighteen degrees, eighteen minutes West thirty three miles twenty eight chains and eighty links, to a rock, from which, another rock bears North, eighteen degrees, eighteen minutes east fifty links and another rock bears South fifty links; thence South four miles, to a post on the lower bank of the North fork of Canadian river, at its junction with Canadian river, from which a Cotton wood, twenty four inches diameter, bears north eighteen degrees East, forty links, and a Cotton wood, fifteen inches diameter bears South nine degrees East fourteen links; thence down the Canadian river, on its north bank, to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the South bank of Arkansas river four chains and fifty four links, East of Fort Smith; thence north seven degrees, twenty five minutes west, with the Western boundary of the State of Arkansas, seventy six miles, sixty four chains and fifty links to the South west corner of the State of Missouri; thence North, on the Western boundary of the State of Missouri, eight miles, forty nine chains and fifty links, to the north bank of Cowskin or Seneca river at a mound

six feet square at base, and five feet high, in which is a post marked on the South side, Cor. n. Ch. L. d; thence west on the southern boundary of the lands of the Senecas, eleven miles and forty eight chains to a post on the east bank of Neosho river, from which a maple, eighteen inches in diameter, bears South thirty one degrees East, seventy two links; thence up Neosho river, with its meanders, on the east bank, to the southern boundary of Osage lands, thirty six chains and fifty links west of the South east corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of Neosho river; thence west on the southern boundary of the Osage lands; to the line dividing the territory of the United States from that of Mexico, two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence South along the line of the territory of the United States and Mexico, sixty miles and twelve chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited cylinder of charcoal, eighteen inches long and three inches diameter; thence East, along the northern boundary of Creek lands, two hundred and seventy three miles fifty five chains and sixty six links to the beginning, containing within the survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.

"And Whereas, the United States have also caused the said tract of eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof to be as follows:

Beginning at South east corner of Osage lands, described by a rock from which a red oak, twenty inches diameter bears South twenty seven degrees East seventy six links, and a burr oak, thirty inches diameter, bears South fifty nine degrees West one chain; and another burr oak, thirty inches diameter, bears North eight degrees west, one chain and thirty seven links; and another burr oak forty inches diameter bears north thirty degrees west, one chain, and eighty one links, and running east twenty five miles to a rock on the western line of the State of Missouri, from which a post-oak, ten inches diameter, bears North forty eight degrees, thirty minutes east, four chains; and a post oak, twelve inches diameter, bears South sixty two degrees, East five chains; thence North, with the western boundary of the State of Missouri, fifty miles, to a mound of earth five feet square at base and four and a half feet high; thence West twenty five miles to the North east corner of the lands of the Osages, described by a mound of earth six feet square at the base and five feet high; thence South along the Eastern boundary of Osage lands, fifty miles, to the beginning: containing eight hundred thousand acres.

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted and by these presents do give and grant unto the said Cherokee Nation, the two tracts of land so surveyed, and hereinbefore described, containing in the whole, Fourteen Millions, three hundred and seventy four thousand one hundred and thirty five acres, and fourteen hundredths of an acre: To have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever, subject however, to the right of the United States to permit other tribes of

red men to get salt on the salt plain on the western prairie, referred to in the Second Article of the treaty of the twenty ninth of December, one thousand eight hundred and thirty five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States, in and by the article herein before recited, to the extent and in the manner, in which the said rights are so reserved; and subject also to the condition provided by the Act of Congress of the twenty eighth of May, one thousand eight hundred and thirty; referred to in the above recited third Article, and which condition is, that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct or abandons the same."

V.

Included in the 13,574,135.14 acre tract granted in the above patent, in fee simple, to the Cherokee Nation, and located in present Oklahoma, were the riverbed lands described herein above which form the subject matter of this suit. As originally surveyed in 1837, by United States Surveyors, there was no distinction or division line made between the Cherokee Outlet lands and the Cherokee home tract; the area was surveyed as one tract, and the whole tract of 13,574,135.14 in present Oklahoma was marked on the original plat as, "Cherokee Lands", and patented to the Cherokee Nation accordingly.

VI.

That on April 26, 1906, pursuant to the provisions of Section 27 of an Act of Congress of that date (34 Stat. 137), fee title to the said river bed lands described

herein, "as lands belonging to the Cherokee Tribe", passed to and became vested in the United States of America in Trust for the use and benefit of the members of said Cherokee Nation or Tribe, and their respective heirs, and that said Trust title exists today undiminished and unextinguished; that over the years since 1906 the Defendants, State of Oklahoma and the Commissioners of the Land Office, in violation of the provisions of Section I of the Act of June 16, 1906 (the Enabling Act, 34 Stat. 267) have collected large sums of money from various persons, firms and corporations, as bonuses, rentals and royalties, under terms of certain purported contracts or leases covering portions of said described river bed, the exact amount of which is unknown to the said Cherokee Nation or Tribe of Indians; that said monies as thus collected belong to said Nation or to its Guardian and Trustee, the United States, for the use and benefit of the members of said Nation, as above set out.

VII.

That said purported leases and contracts covering said portions of said river bed have all been entered into by various persons, firms and corporations mistakenly and innocently in apparent reliance upon the force and effect of certain decisions of the Supreme Court of Oklahoma, and by reason of the circumstances, and in good conscience and equity, the Cherokee Nation or Tribe believes that it is only entitled to (1) recover from the State of Oklahoma and the Commissioners of the Land Office judgment for all monies heretofore by them so collected, and (2) to an order compelling said State and said Land Office to forthwith pay to the United States of America, for the use of said Cherokee Nation or Tribe of Indians, all monies derived from said leases which said defendants now hold and have not otherwise expended, and (3) judgment against the said corporate and other defendants requiring them to pay all future royalties

derived from their respective leases to the United States of America as Trustee for said Cherokee Nation or Tribe of Indians, and (4) an order restraining each and every defendant from interfering in any manner or form after final judgment herein with the rights of either the United States or the said Cherokee Nation or Tribe of Indians in their peaceful possession and lawful use of the said property.

WHEREFORE, Plaintiff prays for Judgment against said defendant, the State of Oklahoma and the Defendant, The Commissioners of the Land Office, for an accounting of all monies said defendants have derived from any purported lease covering any portion of the bed and banks of said Arkansas river as described herein, and for an order decreeing to said Plaintiff lawful ownership of all monies derived from said lease or leases, and directing said defendants to pay said monies to the United States of America in Trust for said Plaintiff; and for further order and judgment against the corporate and other defendants named in the caption hereof, requiring each of them hereafter to account to the United States of America as Trustee for the Cherokee Tribe all future rentals or royalties due under the terms of any existing contracts or leases; and for further order restraining each and all of the Defendants from interfering in any manner or form with the right of either the United States of America or of the Cherokee Nation or Tribe in and to the lawful use of said river bed, and for all costs expended herein, together with reasonable attorneys fee and all other equitable relief.

/s/ Earl Boyd Pierce, ATTORNEY
FOR CHEROKEE NATION OR TRIBE
OF INDIANS OF OKLAHOMA
1008 Barnes Building
Muskogee, Oklahoma

OF COUNSEL:

ANDREW C. WILCOXEN
Muskogee, Oklahoma

[Filed December 23, 1966]

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes SOUTHLAND ROYALTY COMPANY, one of the Defendants in the above styled and numbered cause, hereinafter called Defendant, and files this its original answer in response to Plaintiff's Original Complaint and for such answer would respectfully show the Court as follows:

1.

Defendant is without sufficient information to either admit or deny the allegations as contained in Paragraphs I through VII of Plaintiff's Original Complaint as filed herein.

WHEREFORE, premises considered, Defendant prays that Plaintiff take nothing by this suit and that costs be assessed against Plaintiff.

* * * * *

CROSS-COMPLAINT

Comes now SOUTHLAND ROYALTY COMPANY and files this its cross-complaint against the STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA, two of the named Defendants in the above styled and numbered cause and for such cross-complaint would show the following:

1.

This Cross-Complaint is asserted against the STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA, two of the Defendants in the action asserted by Plaintiff herein and the Court has jurisdiction over the parties and the Cross-Complaint to the same extent as such is applicable to the cause of action asserted by Plaintiff herein.

2.

The STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA have, expressly and/or by implication, represented and warranted to SOUTHLAND ROYALTY COMPANY that such leasehold or other interest acquired by said company from said Cross-Defendants and which are the subject matter of the cause of action herein sued upon were owned by the STATE OF OKLAHOMA and subject to conveyance, transfer and assignment free of encumbrances and any other claims of any title or interest therein by any and all third parties. Cross-Complainant would further show that said Cross-Defendants are liable to SOUTHLAND ROYALTY COMPANY for all losses, damages and expenses which may be incurred or sustained by reason of the cause asserted by Plaintiff herein and accordingly SOUTHLAND ROYALTY COMPANY is entitled to indemnity for any and all of the same.

WHEREFORE, SOUTHLAND ROYALTY COMPANY prays for judgment over against Co-Defendants and Cross-Defendants herein, the STATE OF OKLAHOMA and the COMMISSIONERS OF THE LAND OFFICE OF AND FOR THE STATE OF OKLAHOMA, for any and all losses, damages and expenses incurred or sustained by SOUTHLAND ROYALTY COMPANY growing out of or

pertaining to the cause as asserted by Plaintiff herein which in any way may be sustained or incurred by the said SOUTHLAND ROYALTY COMPANY.

Respectfully submitted,

HUDSON, KELTNER, SMITH & CUNNINGHAM

By /s/ Dale B. Hinson
1905 Continental Life Building
Fort Worth, Texas

ATTORNEYS FOR SOUTHLAND ROYALTY COMPANY

[Certificate]

[Filed December 30, 1966]

ANSWER OF DEFENDANT, YAHOLA SAND AND GRAVEL COMPANY, A CORPORATION

1.

The Defendant, for answer to the complaint of the Plaintiff filed herein, states that it is without knowledge as to the matters and things set out in Section I through V of said complaint, and, therefore, neither admits nor denies such allegations.

2.

With respect to the allegations of Sections VI and VII of the Plaintiff's complaint, this Defendant states that it is without knowledge as to the questions of title set forth therein or the right of the Plaintiff to recover from the State of Oklahoma.

This Defendant admits that it is the owner and holder of two leases from The State of Oklahoma, acting through the Commissioners of the Land Office, which involve lands within the bed of the Arkansas River in the area involved in this cause and admits that it has paid rentals and royalties with respect thereto to the Commissioners of the Land Office of Oklahoma. Said leases were by it entered into in good faith and the payments made thereunder were paid to the Commissioners of the Land Office of Oklahoma in good faith. This Defendant has expended large sums of money in developing or preparing to develop said leases and said leases should be by this Court held to be valid and subsisting leases, subject only to the payment to the proper person or persons of the rentals and royalties due thereunder. Copies of said leases are attached hereto as Exhibit "A" and Exhibit "B".

This Defendant further states that it will pay all rentals and royalties due pursuant to said leases during the pendency of this cause into the Registry of this Court and will abide by such judgment as this Court may render with respect to the person or persons to whom said rentals and royalties should be paid during the period of said leases.

WHEREFORE, this Defendant prays that this Court do enter its decree finding said leases above referred to to be valid and existing leases and that this defendant be entitled to all the benefits thereof for the period of said leases, subject only to the payment to such person or persons as this Court may direct of the rentals and royalties due thereunder, and that during the period of the pendency of this cause that this Defendant be authorized and directed to pay such rentals and royalties as may become due under said leases into the Registry of this Court to be paid over to the person or persons found by this Court entitled thereto and that this Court

further find that all previous payments of rentals and royalties as due have been made by this Defendant and that this Defendant be relieved of any further liability with regard thereto.

FITE, ROBINSON & SUMMERS

By /s/ Julian B. Fite
Attorneys for Defendant,
Yahola Sand & Gravel
Company

STATE OF OKLAHOMA
COUNTY OF MUSKOGEE

William Dills, upon oath being first duly sworn, states that he is the Vice -President of Yahola Sand and Gravel Company, Defendant herein, and makes this affidavit on behalf of said Defendant; he states that he has read the within and foregoing Answer and the matters and things therein set forth are true.

/s/ William Dills

Subscribed and sworn to before me this 29th day of December, 1966.

/s/ Elizabeth Vogel
Notary Public

My commission expires
July 29, 1970

EXHIBIT A

SAND AND/OR GRAVEL LEASE CONTRACT

KNOW ALL MEN BY THESE PRESENTS:

THIS INDENTURE, made and entered into this the 2nd day of June, 1964 by and between the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, hereinafter designated as the party of the first part, and Yahola Sand and Gravel Company, a corporation, 326 Merchants National Bank Building, Fort Smith, Arkansas, authorized to do business in the State of Oklahoma, designated as party of the second part:

WITNESSETH: That in consideration of the sum of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, the receipt of which is hereby acknowledged, additional consideration, covenants and conditions hereafter set forth, the party of the first part hereby grants and conveys unto the party of the second part, the right and privilege to remove not to exceed one hundred twenty-five thousand (125,000) cubic yards of sand and/or gravel from that part or portion of the bed of the Arkansas River in the following Sections:

> Sections 3, 4, 5, 6, 7, 8, 18, 19 and 30 in Township 10 North, Range 27 East; and Sections 22, 27, 31, 32, 33 and 34 in Township 11 North, Range 27 East; and Sections 12, 13, 14 and 24 in Township 10 North, Range 26 East, situate in LeFlore and/or Sequoyah Counties, Oklahoma,

with the specific understanding that if not more than one hundred twenty-five thousand (125,000) cubic yards of sand and/or gravel is removed, no refund of any part or portion of said remittance will be made. The party of the second part is hereby granted the right and privilege

to remove any amount of such materials in excess of one hundred twenty-five thousand (125,000) cubic yards with the specific understanding that additional consideration at the rate of five cents (.05) per cubic yard must be paid for all materials removed in excess of one hundred twenty-five thousand (125,000) cubic yards.

This contract is for a period of five (5) years from and after July 14th, 1964, and is subject to the rights of the United States Government, Easements, Leases, or any other rights in, upon, over or across said premises now outstanding in third parties, if any, and the covenants, conditions and obligations hereinafter set forth.

1. It is agreed that the *party of the second part shall commence operation to* remove sand and/or gravel from the premises above described within one year from date hereof and shall keep a daily record of all sand and/or gravel removed from said premises and shall *file a written notice and report with the party of the first part* at its office in the State Capitol in Oklahoma City, Oklahoma, *each thirty (30) day period, beginning thirty days (30) after the date of this contract, giving the total number of cubic yards of sand and/or gravel removed during the immediately preceding thirty (30) days period,* and after one hundred twenty-five thousand (125,000) cubic yards of such materials has been removed from said premises, a remittance for any excess materials removed within the thirty (30) day periods must accompany the notice and report.

2. It is agreed and understood that party of the first part, its representatives or agents, shall be allowed to enter upon and into any part of the premises for the purpose of inspection, and that they shall have access, at reasonable times and places, to the books and records of party of the second part, showing the amounts of sand and/or gravel removed from the premises, for auditing purposes.

3. It is agreed and understood that party of the second part shall operate all workings upon the premises in a workmanlike manner, and that it will hold party of the first part harmless from any and all claims which might arise from the operations under this contract, and that at the expiration of this contract, or the prior termination thereof, it will remove from the premises all machinery, dredges, boats, pipes, piers, buildings and all other appliances, equipment or devices erected upon the premises or used in connection with the operations under this contract, and it shall promptly surrender and return the premises to party of the first part, or to whomsoever as shall be legally entitled thereto.

4. It is agreed and understood that party of the second part shall use the premises only for the purpose herein specified, and that party of the second part shall not cause or permit any nuisance to be maintained upon the premises.

5. It is agreed and understood that party of the second part shall not install, maintain or operate any device which will interfere with navigation upon said Arkansas River without prior approval from the duly constituted authorities.

6. It is agreed and understood that party of the second part shall be liable to the riparian owners adjacent to the premises included within this contract, for any and all damages or losses which may accrue to such adjacent riparian owners by reason of the removal of sand and/or gravel from the premises, and in the event of such loss or damage, if the party of the second part and such riparian owner or owners adjacent to the premises cannot agree upon the amount of such damages the same shall be determined in the manner now provided, or which may hereafter be provided by the laws of the State of Oklahoma. Party of the second part agrees to pay all such damages so determined within ten (10) days

after the final determination thereof, and the amount of such damages may be recovered from the party of the second part or the surety upon its bond given to secure the faithful performance of the covenants, conditions and agreements contained in this contract.

7. It is agreed and understood that no assignment, sale or transfer of this contract, or any part thereof, whether by act of the parties or by operation of law, shall be valid or convey to and vest in the assignee, transferee or purchaser, any right, title, interest, equity or estate in or to the premises, unless such assignment, transfer or sale shall first be approved in writing by party of the first part, and a copy of the assignment, transfer, bill of sale, or other written evidence thereof, be filed in the office of the party of the first part; and any such transferee, assignee or purchaser, if approved by party of the first part, shall furnish a bond to the satisfaction of party of the first part, conditioned for the faithful performance of the terms, covenants and conditions of this contract, and the payment of such transfer fee as may be required by the rules and regulations of the party of the first part.

8. It is agreed and understood that before this contract shall be of any force and effect, party of the second part shall give a good and sufficient bond in the penal sum of One Thousand ($1,000.00) Dollars, conditioned for the faithful performance of the terms, covenants and conditions of this contract by party of the second part, such bond to be approved by party of the first part.

9. It is agreed and understood that all machinery, tools, equipment, engines, dredges, boats, piers, and all other property used by party of the second part to remove sand and/or gravel from the premises shall remain the property of party of the second part, and the same

may be removed from the premises at any time prior to the termination of this contract, provided, however, that party of the first part shall have a lien upon all such equipment, and upon all sand and/or gravel in excess of one hundred twenty-five thousand (125,000) cubic yards, which has been removed from the premises but not sold, wherever located, for any and all sums which are or may be due to party of the first part from party of the second part, and any encumbrances placed upon such equipment shall be subject to and inferior to the prior lien thereon held by party of the first part.

10. It is agreed and understood that this contract grants unto party of the second part the right to remove only sand and/or gravel from the premises, and that party of the second part shall not knowingly remove from the premises any gold, silver, cinnabar, lead, zinc, tin, copper, nickel, asphalt, coal gypsum, glass sand, saline deposits, precious stones, or any material which may be the source of fissionable materials, or other valuable deposits, in commercial quantities.

11. It is agreed and understood that the terms, covenants, conditions and obligations contained in this contract shall be binding upon the successors or assigns of the parties, and that upon the violation or breach of any of them or the laws of the State of Oklahoma, relating to public lands, party of the first part shall have the right to revoke and cancel this contract, upon 30 days written notice of cancellation to party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

12. It is agreed and understood that at the expiration of the term of this contract, should party of the second part desire to obtain an extension or renewal thereof, and should party of the first part desire to lease or let the premises for the purpose of removal of sand and/or gravel therefrom, said party of the second part

shall have the right to, and receive, all rights or privileges usually extended to preference right lessees by party of the first part, in the renewal or extension of surface leases, upon such terms and conditions, and for such rental as may be fixed by party of the first part or their successors, either at public or private sale.

IN WITNESS WHEREOF the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, have caused these presents to be executed by their Vice Chairman and attested by their Secretary, on the date first above written, and Yahola Sand and Gravel Company, a corporation, has caused these presents to be executed by its Vice Chairman and attested by its Secretary.

THE COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA

By James M. Bullord
Vice Chairman
PARTY OF THE FIRST PART

ATTEST:
Sue Hays
Secretary

YAHOLA SAND AND GRAVEL COMPANY

By /s/ William Dills
Vice President
PARTY OF THE SECOND PART

ATTEST:
Beulah K. Dills
Secretary

STATE OF OKLAHOMA
COUNTY OF MUSKOGEE

Before me, the undersigned, a Notary Public, in and for the State of Oklahoma on this 2nd day of June, 1964, personally appeared William Dills to me known to be the identical person who subscribed the name of the maker hereof to the foregoing instrument as its Vice President, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year 1st above written.

Elizabeth Vogel
Notary Public

My Commission Expires:
January 24, 1966

AMENDMENT TO
SAND AND/OR GRAVEL LEASE CONTRACT
DATED JUNE 2, 1969

Easement No. 3968

Lease No. CS-5410
Easement No. 3730

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the sum of Fifty ($50.00) Dollars, the receipt of which is hereby acknowledged, and for

good cause shown, the Commissioners of the Land Office of the State of Oklahoma hereby amend covenant No. 1 of page 1 of Sand and/or Gravel Lease Contract dated June 2, 1964, by and between the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma, party of the first part, and Yahola Sand and Gravel Company, a corporation, party of the second part, to extend the period of time within which to commence operation to remove sand and/or gravel from that part or portion of the bed of the Arkansas River in the following sections:

> Sections 3, 4, 5, 6, 7, 8, 18, 19 and 30 in Township 10 North, Range 27 East; and Sections 22, 27, 31, 32, 33 and 34, in Township 11 North, Range 27 East; and Sections 12, 13, 14 and 24 in Township 10 North, Range 26 East, situate in LeFlore and/or Sequoyah Counties, Oklahoma,

to February 15, 1967.

It is agreed and understood that this Amendment shall in no wise affect any of the other covenants, conditions and obligations set forth in said Sand and/or Gravel Lease Contract and that this Amendment shall be binding upon the successors or assigns of the parties to said contract, and that upon the violation or breach of any provision of said contract as amended the party of the first part shall have the right to revoke and cancel said contract upon thirty (30) days written notice of the cancellation to the party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

IN WITNESS WHEREOF the said parties have caused their signatures to be subscribed hereto this 8th day of February, 1966.

COMMISSIONERS OF THE LAND OFFICE
STATE OF OKLAHOMA

By /s/ James M. Bullard
Vice Chairman
PARTY OF THE FIRST PART

ATTEST:
Sue Hays
Secretary

YAHOLA SAND AND GRAVEL COMPANY

By /s/ R. W. Dills
President
PARTY OF THE SECOND PARTY

ATTEST:
Winifred Reitz
Asst. Secretary

THE COMMISSIONERS OF THE LAND OFFICE,
Oklahoma City, Okla.

Date: February 8, 1966

[Permanent Fund]
Acknowledges Receipt of
$50.00 **Applied as Follows**

Loan No. _____

Sales No. _____

Consideration for
an Amendment $50.00

Lease No. CS-5410

County LeFlore &/or Sequoyah

Consideration for an Amendment to Sand and/or Gravel Lease Contract dated June 2, 1964, Easement No. 3730, covering certain parts or portions of the bed of the Arkansas River.

[Yahola Sand and Gravel Company
326 Merchants National Bank Bldg.
Fort Smith, Arkansas]

[Amendment filed on Easement No. 3968 and attached to Easement No. 3730]

MISCELLANEOUS RECEIPT

Rem. # 7309 (Ck. # 10323)

[Paid February 9, 1966
Commissioners of Land Office]

THE COMMISSIONERS OF THE LAND OFFICE,
Oklahoma City, Okla.

Date 5/13/1964

Acknowledges Receipt of
$6,250.00 Applied as Follows

Loan No. _____

Sales No. _____

Lease No. CS 5410

County _____

ESCROW $6,250.00

(Pending Issuance of Lease Contract for removal of sand and/or gravel from bed of Arkansas River in every section in 10 & 11 N, 26 & 27E)

[Yahola Sand And Gravel
Company
326 Merchants Natl Bank Bldg.
Fort Smith, Arkansas 72901] 1369

MISCELLANEOUS RECEIPT

[Paid May 13, 1964
Commissioners of the
LAND OFFICE
Oklahoma]

EXHIBIT "B"

SAND AND/OR GRAVEL LEASE CONTRACT

Lease No. CS-5412
Easm. No. 3744

KNOW ALL MEN BY THESE PRESENTS:

THIS INDENTURE, made and entered into this the 28th day of July, 1964 by and between the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, hereinafter designated as the party of the first part, and Yahola Sand and Gravel Company, a corporation, 326 Merchants National Bank Building, Fort Smith, Arkansas, authorized to do business in the State of Oklahoma, designated as party of the second part:

WITNESSETH: That in consideration of the sum of One Thousand ($1,000.00) Dollars, the receipt of which is hereby acknowledged, additional consideration, covenants and conditions hereafter set forth, the party of the first part hereby grants and conveys unto the party of the second part, the non-exclusive right and privilege to remove not to exceed twenty thousand (20,000) cubic yards of sand and/or gravel from that part or portion of the bed of the Arkansas River to the following Sections:

> 33 and 34 in Township 12 North, Range 21 East, situate in Muskogee and Sequoyah Counties, Oklahoma,

with the specific understanding that if not more than twenty thousand (20,000) cubic yards of sand and/or gravel is removed, no refund of any part or portion of said remittance will be made. The party of the second part is hereby granted the right and privilege to remove any amount of such materials in excess of twenty thou-

sand (20,000) cubic yards with the specific understanding that additional consideration at the rate of five cents (.05) per cubic yard must be paid for all materials removed in excess of twenty thousand (20,000) cubic yards.

This contract is for a period of four years from and after July 28th, 1964, and is subject to the rights of the United States Government, Easements, Leases, or any other rights in, upon, over or across said premises now outstanding in third parties, if any, and the covenants, conditions and obligations hereinafter set forth.

1. It is agreed that the *party of the second part shall* commence operation to remove sand and/or gravel from the premises above described within one year from date hereof and shall keep a daily record of all sand and/or gravel removed from said premises and shall *file a written notice and report with the party of the first part at it's office in the State Capitol in Oklahoma City, Oklahoma, each thirty (30) day period, beginning thirty days (30) after the date of this contract, giving the total number of cubic yards of sand and/or gravel removed during the immediately preceding thirty (30) days period,* and after twenty thousand (20,000) cubic yards of such materials has been removed from said premises, a remittance for any excess materials removed within the thirty (30) day periods must accompany the notice and report.

2. It is agreed and understood that party of the first part, its representatives or agents, shall be allowed to enter upon and into any part of the premises for the purpose of inspection, and that they shall have access, at reasonable times and places, to the books and records of party of the second part, showing the amounts of sand and/or gravel removed from the premises, for auditing purposes.

3. It is agreed and understood that party of the

second part shall operate all workings upon the premises in a workmanlike manner, and that it will hold party of the first part harmless from any and all claims which might arise from the operations under this contract, and that at the expiration of this contract, or the prior termination thereof, it will remove from the premises all machinery, dredges, boats, pipes, piers, buildings and all other appliances, equipment or devices erected upon the premises or used in connection with the operations under this contract, and it shall promptly surrender and return the premises to party of the first part, or to whomsoever as shall be legally entitled thereto.

4. It is agreed and understood that party of the second part shall use the premises only for the purpose herein specified, and that party of the second part shall not cause or permit any nuisance to be maintained upon the premises.

5. It is agreed and understood that party of the second part shall not install, maintain or operate any device which will interfere with navigation upon said Arkansas River without prior approval from the duly constituted authorities.

6. It is agreed and understood that party of the second part shall be liable to the riparian owners adjacent to the premises included within this contract, for any and all damages or losses which may accrue to such adjacent riparian owners by reason of the removal of sand and/or gravel from the premises, and in the event of such loss or damage, if the party of the second part and such riparian owner or owners adjacent to the premises cannot agree upon the amount of such damages the same shall be determined in the manner now provided, or which may hereafter be profided by the laws of the State of Oklahoma. Party of the second part agrees to pay all such damages so determined within ten (10) days

after the final determination thereof, and the amount of such damages may be recovered from the party of the second part or the surety upon its bond given to secure the faithful performance of the covenants, conditions and agreements contained in this contract.

7. It is agreed and understood that no assignment, sale or transfer of this contract, or any part thereof, whether by act of the parties or by operation of law, shall be valid or convey to and vest in the assignee, transferee or purchaser, any right, title, interest, equity or estate in or to the premises, unless such assignment, transfer or sale shall first be approved in writing by party of the first part, and a copy of the assignment, transfer, bill of sale, or other written evidence thereof, be filed in the office of the party of the first part; and any such transferee, assignee, or purchaser, if approved by party of the first part, shall furnish a bond to the satisfaction of party of the first part, conditioned for the faithful performance of the terms, covenants and conditions of this contract, and the payment of such transfer fee as may be required by the rules and regulations of the party of the first part.

8. It is agreed and understood that before this contract shall be of any force and effect, party of the second part shall give a good and sufficient bond in the penal sum of One Thousand ($1,000.00) Dollars, conditioned for the faithful performance of the terms, covenants and conditions of this contract by party of the second part, such bond to be approved by party of the first part.

9. It is agreed and understood that all machinery, tools, equipment, engines, dredges, boats, piers, and all other property used by party of the second part to remove sand and/or gravel from the premises shall remain the property of the party of the second part, and the

same may be removed from the premises at any time prior to the termination of this contract, provided, however, that party of the first part shall have a lien upon all such equipment, and upon all sand and/or gravel in excess of twenty thousand (20,000) cubic yards, which has been removed from the premises but not sold, wherever located, for any and all sums which are or may be due to party of the first part from party of the second part, and any encumbrances placed upon such equipment shall be subject to and inferior to the prior lien thereon held by party of the first part.

10. It is agreed and understood that this contract grants unto party of the second part the right to remove only sand and/or gravel from the premises and that party of the second part shall not knowingly remove from the premises any gold, silver, cinnabar, lead, zinc, tin, copper, nickel, asphalt, coal gypsum, glass sand, saline deposits, precious stones, or any material which may be the source of fissionable materials, or other valuable deposits, in commercial quantities.

11. It is agreed and understood that the terms, covenants, conditions and obligations contained in this contract shall be binding upon the successors or assigns of the parties, and that upon the violation or breach of any of them or the laws of the State of Oklahoma, relating to public lands, party of the first part shall have the right to revoke and cancel this contract, upon 30 days written notice of cancellation to party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

12. It is agreed and understood that at the expiration of the term of this contract, should party of the second part desire to obtain an extension or renewal thereof, and should party of the first part desire to lease or let the premises for the purpose of removal of sand and/or

gravel therefrom, said party of the second part shall have the right to, and receive, all rights or privileges usually extended to preference right lessees by party of the first part, in the renewal or extension of surface leases, upon such terms and conditions, and for such rental as may be fixed by party of the first part or their successors, either at public or private sale.

IN WITNESS WHEREOF the Commissioners of the Land Office of the State of Oklahoma, for and on behalf of the State of Oklahoma, have caused these presents to be executed by their Vice Chairman and attested by their Secretary, on the date first above written, and Yahola Sand and Gravel Company, a corporation, has caused these presents to be executed by its Vice President and attested by its Asst. Secretary.

ATTEST: (SEAL)
/s/ (Illegible Signature)
_____Secretary

THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

By /s/ James M. Bullard
Vice Chairman
PARTY OF THE FIRST PART

ATTEST: (SEAL)
/s/ Winifred Reitz
Assistant Secretary

YAHOLA SAND AND GRAVEL COMPANY,

By /s/ William Dills
Vice President
PARTY OF THE SECOND PART

[JURAT]

AMENDMENT TO
SAND AND/OR GRAVEL LEASE CONTRACT
Dated July 28, 1964

Easement No. 3969

Lease No. CS-5412
Easement No. 3744

KNOW ALL MEN BY THESE PRESENTS:

In consideration of the sum of Fifty ($50.00) Dollars, the receipt of which is hereby acknowledged, and for good cause shown, the Commissioners of the Land Office of the State of Oklahoma hereby amend covenant No. 1 of page 1 of Sand and/or Gravel Lease Contract dated July 28, 1964, by and between the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma, party of the first part, and Yahola Sand and Gravel Company, a corporation, party of the second part, to extend the period of time within which to commence operation to remove sand and/or gravel from that part or portion of the bed of the Arkansas River in the following sections:

Sections 33 and 34, Township 12 North, Range 21 East, situate in Muskogee and Sequoyah Counties, Oklahoma,

to February 15, 1967.

It is agreed and understood that this Amendment shall in no wise affect any of the other covenants, conditions and obligations set forth in said Sand and/or Gravel Lease Contract and that this Amendment shall be binding upon the successors or assigns of the parties to said contract, and that upon the violation or breach of any provision of said contract as amended the party of the

first part shall have the right to revoke and cancel said contract upon thirty (30) days written notice of the cancellation to the party of the second part at its office and place of business in Fort Smith, Arkansas, or any other office it may maintain.

IN WITNESS WHEREOF the said parties have caused their signatures to be subscribed hereto this 8th day of February, 1966.

ATTEST: (SEAL)
_____ Secretary

COMMISSIONERS OF THE LAND OFFICE STATE OF OKLAHOMA

By /s/ James M. Bullard
Vice Chairman
PARTY OF THE FIRST PART

ATTEST: (SEAL)

/s/ (Illegible Signature)
_____Secretary

YAHOLA SAND AND GRAVEL COMPANY

By /s/ R. N. Dills
_____President
PARTY OF THE SECOND PART

NATIONAL SURETY CORPORATION
A Member of The FUND Insurance Companies

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that NATIONAL SURETY CORPORATION, a Corporation duly organized and existing under the laws of the State of New York, and having its principal office in the City of New York, New York, and its home office in the City

and County of San Francisco, California (hereinafter called the Corporation), has made, constituted and appointed, and does by these presents make, constitute and appoint

Arthur J. Beach

of Oklahoma City and State of Oklahoma its true and lawful Attorney(s)-in-Fact, with full power and authority hereby conferred in its name, place and stead, to execute, seal, acknowledge and deliver any and all bonds, recognizances, contracts, agreements of indemnity and other conditional or obligatory undertakings;

and to bind the Corporation thereby as fully and to the same extent as if such bonds were signed by the President, sealed with the corporate seal of the Corporation and duly attested by its Secretary, hereby ratifying and confirming all that the said Attorney(s)-in-Fact may do in the premises.

IN WITNESS WHEREOF, NATIONAL SURETY CORPORATION has caused these presents to be signed by its

Vice President, attested by its Assistant Secretary, and its corporate seal to be hereto affixed this 21st day of December A.D., 1966.

NATIONAL SURETY CORPORATION
By C. A. Keppler
Vice President

[Seal]

ATTEST: George F. Texido
Assistant Secretary

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

On this 21st day of December A.D., 1955, before me

personally came C. A. Keppler–Maplewood, New Jersey, to me known, who, being by me duly sworn, did depose and say, that he is Vice President of NATIONAL SURETY CORPORATION, the Corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order. And said C. A. Keppler further said that he is acquainted with Geo. F. Texido and knows him to be an Assistant Secretary of said Corporation; and that he executed the above instrument.

Elizabeth C. King
Notary Public

STATE OF NEW YORK
COUNTY OF NEW YORK ss.:

I, Geo. F. Texido, Assistant Secretary of NATIONAL SURETY CORPORATION, do hereby certify that the following is a full, true and correct copy of Article VIII of the By-laws of the NATIONAL SURETY CORPORATION adopted on the 25th day of October, 1955, and now in full force and effect, to wit:

ARTICLE VIII

Appointment and Authority of Resident Assistant Secretaries, and Attorneys-in-Fact and Agents to Accept Legal Process and Make Appearances.

"SECTION 30. APPOINTMENT. The President, any Vice President or any other person authorized by the Board of Directors, the Chairman of the Board of Directors, the President or any Vice President, may, from time to time, appoint Resident Assistant Secretaries and Attorneys-in-Fact to repre-

sent and act for and on behalf of the Corporation and Agents to accept legal process and make appearances for and on behalf of the Corporation.

"SECTION 31. AUTHORITY. The authority of such Resident Assistant Secretaries, Attorneys-in-Fact, and Agents shall be as prescribed in the instrument evidencing their appointment, and any such appointment and all authority granted thereby may be revoked at any time by the Board of Directors or by any person empowered to make such appointment."

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of NATIONAL SURETY CORPORATION, this 21st day of December, 1955.

Geo. F. Texido
Assistant Secretary of
[Corporate Seal] NATIONAL SURETY CORPORATION

STATE OF OKLAHOMA
COUNTY OF OKLAHOMA ss.:

I, A. MacDonald, Resident Assistant Secretary of NATIONAL SURETY CORPORATION, a corporation of the State of New York, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney issued by said Corporation and that I have compared same with the original and that it is a correct transcript therefrom and of the whole of the original. Said power of attorney is in full force and effect and has not been revoked.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Corporation, at the City of Oklahoma City, Okla. this 22nd day of July 1964.

A. MacDonald
Resident Assistant Secretary

PERFORMANCE BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, Yahola Sand and Gravel Company, a corporation, 326 Merchants National Bank Building, Fort Smith, Arkansas, authorized to do business in the State of Oklahoma, as principal and National Surety Corporation, a corporation, organized and existing under the laws of the State of New York, fully authorized to transact business in the State of Oklahoma, whose principal office is , as surety, are held and firmly bound unto the State of Oklahoma in the sum of One Thousand Dollars ($1,000.00) for the payment of which amount we hereby bind and obligate ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

The conditions of the above obligation are such that if the above bounded Yahola Sand and Gravel Company, a corporation, its successors and assigns, or any of them, do and shall well and truly in all things perform faithfully and keep each and all of the covenants, conditions and agreements specified and contained in a certain lease contract made or to be made and executed by the Commissioners of the Land Office of the State of Oklahoma for and on behalf of the State of Oklahoma, in favor of said Yahola Sand and Gravel Company, a corporation, for a period of four years, for the purpose of removing sand and/or gravel from that part or portion of the bed of the Arkansas River in the following Sections:

> 33 and 34 in Township 12 North, Range 21 East, situate in Muskogee and Sequoyah Counties, Oklahoma,

and a copy of said Easement contract will remain on file in the office of the Secretary to the Commissioners of the Land Office of the State of Oklahoma and is hereby

referred to and made a part hereof, as fully and completely as if set out in hull herein, which on the part of said Yahola Sand and Gravel Company, a corporation, ought to be performed, fulfilled and kept according to the true meaning and intent thereof, then the above obligation is to be void, otherwise, the same shall remain in full force and effect.

IN WITNESS WHEREOF, We have hereunto set our hands this 22nd day of July, 1964.

ATTEST: (SEAL)

/s/ Winifred Retz
Asst. Secretary

YAHOLA SAND AND GRAVEL COMPANY, a corp.,
PRINCIPAL

By /s/ William Dills
Vice President

By /s/ (Illegible Signature)
Attorney in Fact

COUNTER-SIGNED:
/s/ (Illegible Signature)
Resident Attorney in Fact
for Oklahoma
2000 Classen Blvd.
Oklahoma City, Okla.,
Address of Resident Attorney in Fact

The above and foregoing Bond approved this 28th day of July, 1964.

ATTEST: (SEAL)

/s/ (Illegible Signature)
_____Secretary

COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

By /s/ (Illegible Signature)
Vice Chairman

THE COMMISSIONERS OF THE LAND OFFICE,
Oklahoma City, Okla.

[Permanent Fund.]
Acknowledges Receipt of
$50.00 **Applied as Follows**

Date Feb. 8, 1966

Loan No. _____

Sales No. _____

Lease No. CS-5412

County Muskogee &/or Sequoyah

Consideration for
an Amendment $50.00

Consideration for an Amendment to Sand and/or Gravel Lease Contract dated July 28, 1964, Easement No. 3744, covering certain parts or portions of the bed of the Arkansas River.

[Yahola Sand and Gravel Company
326 Merchants National Bank Bldg.
Fort Smith, Arkansas]

Rem. # 7309 (Ck. # 10323)

[Amendment filed as Easement No. 3969 and Attached to Easement No. 3744]

MISCELLANEOUS RECEIPT

[Paid February 9, 1966
Commissioners of Land
Office]

[Filed, January 19, 1967]

MEMORANDUM OF DECISION

At a conference on January 13, 1967, between the court and counsel for the majority of the parties involved in the above cases, held for the purpose of arriving at an expeditious handling of the litigation, the court determined after full consultation with the attorneys present, as follows:

1. In the event the Cherokee Nation can be made a party litigant in Case No. 5649, by voluntarily intervening, by being brought in on the motion of an interested party, or at the instance of the court on its own motion, as a necessary party to resolve conflicting claims, the court will undertake to reach a final conclusion in such case as early as possible, holding in abeyance a decision in the remaining cases above listed until final determination in the event of an appeal. The attorneys for the Cherokee Nation have been allowed 15 days in which to decide whether the interests of the tribe in the property involved in the suit is such that they are warranted, in acting in the best interests of the Nation, to petition the court for leave to intervene. At the same time, counsel for other interested parties are given 15 days in which to move the court to make the Cherokee Nation a party to the suit pursuant to the provisions of Rule 19 of the Federal Rules of Civil Procedure. Also, any interested parties, particularly the State of Oklahoma, are requested to submit a brief to the court directed to the authority of the court to require the Cherokee Nation to participate in the litigation.

2. Since a resolution of the rights of the parties to these suits requires a determination of the conflicting claims of the Cherokee Nation and the Choctaw-Chickasaw Nations and between them and the

State of Oklahoma, and since the attorney for the Choctaw-Chickasaw Nations has indicated an intention to intervene in Case No. 6219, the court will undertake to reach a final decision in this case first in the event the Cherokee Nation cannot be made a party to Case No. 5649.

3. As a third possibility, should neither of the above cases work out to be a suitable vehicle for reaching a decision determinative of the rights of all the parties, the court will undertake to select an appropriate United States land condemnation action to conclude as early as practicable.

With a view to allowing counsel ample opportunity to brief fully the questions involved in these cases, the court has concluded that an additional period of 60 days, until March 15, 1967, should be allowed for any attorneys for the parties in these actions to submit briefs, additional briefs, or supplemental briefs directed to the legal issues, as distinguished from factual disputes, involved. These issues are as follows:

1. The navigability of the Arkansas River. Here the primary issue seems to be whether the navigability of the river in the area in which we are concerned in these suits has been established as a matter of law, either by congressional action or by judicial decision; whether an evidentiary hearing is necessary to determine the navigability of the stream; and whether the court can take judicial notice that the river is navigable or that the river is not navigable.

2. The ownership of the river bed. This involves a determination of the legal effect of the treaties between the United States and the Indian tribes with respect to the land conveyed to the tribes, and as an incident thereto a determination of the rights of the State of Oklahoma in the river bed.

3. The effect of movement of the river. It appears to be generally understood and agreed between court and counsel for the parties that with any gradual change in the bed of the river the ownership of the bed moves with the river, with riparian owners gaining or losing land by accretion or reliction. The problem in this area, therefore, appears to be primarily the effect on the ownership of the bed of the river of an avulsive change. Does existing ownership of the bed shift with the river or remain where it was, or both? Related to this problem is the situation where the course of the river is altered by the physical act of the government rather than by natural phenomenon.

4. Dates. It may be important to a determination of the issues to determine as a matter of law the date on which the river was held to be navigable or not navigable. Further it may be important to determine the treaty or act of Congress which is controlling in determining the issue of ownership of the river bed, and therefore the date of the instrument or act.

There may be other legal issues to be considered, such as the rights of sovereignty of the parties involved, and the applicability of statutes of limitation. For the present, however, the court will leave it to the discretion of counsel whether to include in their respective briefs any discussion of such related issues. Such issues may not be involved in Case No. 5649, but probably would be involved in Case No. 6219.

The court desires to point out further that briefs are not required of the parties, and no further briefs are required of those who have already submitted briefs. The purpose of this memorandum of decision is to permit the filing of such briefs.

Edwin Langley
District Judge

[Filed, January 27, 1967]

ANSWER AND CROSS-PETITION OF DEFENDANT, JAKE L. HAMON

Comes now Jake L. Hamon and for answer to complaint herein filed, states:

This defendant has no knowledge as to the facts alleged in said complaint and demands proof thereof.

CROSS-BILL

By way of cross-petition herein this defendant does respectfully show:

That on the 11th day of May, 1961, Charlye V. Davidson as executrix of the estate of C. E. Forrester, deceased, executed and delivered to Mark L. Douglass as lessee an oil and gas mining lease covering, among other lands, Lot 2, Northeast 9.8 acres of Lot 4, all of Lots 5 and 6, and the East 16.65 acres of Lot 7, and the Northwest 10 acres of Lot 8, Section 4, Township 9 North, Range 25 East, together with all accretions or avulsions to such lands, which said lease is of record in Book 385, Page 18 of the records of LeFlore County, Oklahoma; that said lease was thereafter assigned by the said Mark L. Douglass to the undersigned Jake L. Hamon by assignment.

That on the 17th day of December, 1956, Tony Zager and wife, Nettie M. Zager, executed to the Pure Oil Company an oil and gas mining lease covering SW¼ of SE¼ of SE¼, and NW¼ of SE¼ of NW¼, and SW¼ of SE¼, and Southwest 10 acres of Section 9, Township 9 North, Range 25 East, same being of record in Book 340, Page 74 of the records of LeFlore County, and that said lease as to the SW¼ of SE¼ of SE¼, and NW¼ of SE¼ of NW¼, and SW¼ of SE¼, and Southwest 10 acres

of Lot 7 of Section 4, Township 9 North, Range 25 East, was assigned to this answering defendant, who thereafter, insofar as said lease covered the NW¼ of SE¼ of NW¼ of said Section 4, assigned said lease to the Sinclair Oil & Gas Company insofar as the same covered formations to the base of the Cromwell.

That on the 13th day of January, 1965, C. R. Campbell and wife, Georgann Jones Campbell, executed to this answering defendant an oil and gas mining lease covering the East 10.20 acres of Lot 8, Section 4, Township 9 North, Range 25 East, which said lease is of record in Book 438, Page 234 of the records of LeFlore County.

That on the 16th day of November, 1965, the State of Oklahoma, acting by and through the Commissioners of the Land Office of the State of Oklahoma, executed and delivered to this defendant an oil and gas mining lease, same covering all of the Arkansas River bed in Section 3, Township 9 North, Range 25 East, which said lease is of record in Book , Page , of the records of LeFlore County, Oklahoma.

That the leases above described from Charlye V. Davidson, Executrix, Tony Zager and wife, and C. R. Campbell and wife covered lands which were littoral to the Arkansas River bed where said river flows across Section 4, Township 9 North, Range 25 East, and that said leases covered all riparian and accretion rights to said lands.

Further this answering defendant would show that Section 4, Township 9 North, Range 25 East, constitutes a drilling unit pursuant to order of the Corporation Commission of the State of Okalahoma and that this answering defendant is the operator of said unit and that a well has been drilled and is productive of gas, same being located in the NE¼ of NE¼ of SW¼ of said

Section 4. That this defendant is entitled to have all of his rights as operator of said unit confirmed in him as to all of said unit and as to all lands, mineral right owners and their lessees in said unit.

This defendant prays that his rights under said leases and as operator of the unit above referred to be confirmed in him.

Jake L. Hamon
By Dyer & Dyer
/s/ Ezra Dyer

Box 568–Ardmore, Okla.
Attorneys for Defendant
Jake L. Hamon

[Filed, January 30, 1967]

ANSWER OF TENNECO OIL COMPANY

Comes now Tenneco Oil Company and for answer to plaintiff's complaint alleges and states:

1. Defendant admits the jurisdiction of this Court as alleged in paragraph 1 of the complaint and further states that jurisdiction of this Court is invoked by reason of paragraph (a) of Section 1331, Title 28 U.S.C.A.

2. Defendant admits the matters contained in paragraphs II and IV of the complaint reserving the right to object to their relevancy and accuracy after comparison with the original instruments.

3. Defendant specifically denies the allegations contained in paragraphs III, V, VI and VII of plaintiff's complaint.

COUNTER CLAIM

Defendant alleges that upon admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in plaintiff's complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign state of Oklahoma.

Defendant, Tenneco Oil Company, further alleges that it is the owner of four valid and subsisting oil and gas leases dated February 8, 1966, purchased for valuable consideration from the State of Oklahoma covering all that portion of the Arkansas river bed lying and situate in Sections 21, 22, 26 and 27 of Township 10 North, Range 26 East, in LeFlore and Sequoyah counties, Oklahoma.

Defendant further states that the purported claim of plaintiff is without merit and constitutes a cloud on the title of defendant's lessor, the State of Oklahoma, and on the title of defendant's oil and gas leases above described.

WHEREFORE, defendant prays that plaintiff take nothing by reason of its complaint and that this defendant have judgment herein quieting its title to its oil and gas leaseholds herein described, for possession thereof and for such other and further relief as the Court may deem just and proper.

TENNECO OIL COMPANY

By /s/ Glenn R. Davis
Of Boesche, McDermott & Eskridge
300 Drew Building
Tulsa, Oklahoma

[Filed, January 30, 1967]

ANSWER OF DEFENDANT, CITIES SERVICE OIL COMPANY, A CORPORATION

Comes now the defendant, Cities Service Oil Company, for its answer to plaintiff's complaint herein, alleges and states:

1. This defendant is without knowledge as to the matters and facts contained in plaintiff's complaint as filed herein, except such as are hereinafter admitted, qualified or explained, and, therefore, neither admits nor denies such allegations, but asks that plaintiff be required to submit strict proof thereof.

2. This defendant further states that on or about the 8th day of February, 1966, the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, as owners and in possession of the following described land located in LeFlore and/or Sequoyah Counties in the State of Oklahoma, to-wit:

> That part or portion of the following sections or parts of sections in the Arkansas River Bed, containing 100 acres, more or less, set opposite Section 2, Township 9N., Range 25E.,

executed, acknowledged and delivered to Cities Service Oil Company, a certain oil and gas mining lease covering all of the above described land, which lease was duly filed for record on the 28th day of June, 1966, in the Office of the County Clerk of Sequoyah County and State of Oklahoma, and duly recorded in Book 309 at Page 563, copy of said lease is attached hereto as Exhibit "A".

3. This defendant further answering plaintiff's complaint alleges and states that it is the owner of said oil and gas mining lease set out above, and that all of the terms, covenants and conditions of said oil and gas min-

ing lease have been fully kept and performed by this defendant, and that said lease is valid and subsisting at this time.

4. This defendant further says that the said oil and gas mining lease set out above provides, among other things, that unless one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date thereof, or failing so to do said lease shall terminate unless the lessee on or before the expiration of said one year period shall pay to the lessor the sum of One Dollar ($1.00) per acre for the privilege of delaying the drilling and completion of such a well for an additional year. In like manner and upon like payments the completion of a well producing oil or gas in paying quantities may further be deferred.

This defendant has elected to pay the annual rental for the year commencing February 8, 1967 and has paid the same according to the terms of said lease to lessor, but to avoid any question as to proper payment and payee, does hereby tender into the Registry of this Court a duplicate payment in the sum of One Hundred Dollars ($100.00).

Wherefore, this defendant prays that it be decreed to be the owner and holder of a valid and subsisting oil and gas mining lease as herein set out and that during the pendency of this cause that this defendant be authorized to pay annual rentals, if this defendant elect to pay the same, to the Registry of this Court and further, if plaintiff be not adjudged to be the owner of the lands described in said oil and gas mining lease that any and all delay rental payments paid into the Registry of this Court be distributed to the proper party.

This defendant further prays for such other and additional relief to which it may be in equity and good conscience entitled.

/s/ Roy Z. Johnson
Attorney for Defendant,
Cities Service Oil Company
Bartlesville, Oklahoma

EXHIBIT "A"

THE STATE OF OKLAHOMA
OIL AND GAS MINING LEASE

[Filed March 2, 1966]

THIS LEASE, Made and entered into in duplicate, on this 8th day of February, A.D., 1966, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Cities Service Oil Company party of the second part, hereinafter designated as lessee, whose post office address is 105 Southeast 45 Street Oklahoma City, Oklahoma.

(The post office address of lessee for all purposes hereunder shall be as stated until lessor has received written notice of a change thereof).

Under and in pursuance of the provisions of the Constitution and Laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and leasing thereof on school and other public lands belonging to the State of Oklahoma, WITNESSETH:

1. The Lessor, for and in consideration of Six thousand one hundred twenty five dollars and no/100 (6,125.00) DOLLARS, the receipt of which is hereby acknowledged, and the rents and royalties to be paid, and the convenants, stipulations and conditions to be observed and performed as herein set forth, does hereby demise, lease and let unto the lessee for a term of five (5) years from the date hereof and as long thereafter as oil or gas or either of them is produced in paying quantities, the following described tract(s) of land situated in the County of LeFlore and/or Sequoyah Counties, in the State of Oklahoma, to-wit:

That part or portion of the following sections or parts of sections in the Arkansas River Bed containing the approximate acreage set opposite the described sections in LeFlore and/or Sequoyah Counties:

Section 2-9N-25E

containing 100 acres, more or less, and does hereby grant to the lessee the exclusive right and privilege to prospect and drill for, mine and extract all of the oil and natural gas deposits in or under said land, together with the right to pipe, store and remove oil and natural gas and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil, distillate and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil, gas and casinghead gas for fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, without cost into pipe lines, a royalty of one-eighth (1/8) part of the oil or gas produced from the leased premises and a one-eighth (1/8) part of all casinghead or drip gas or gasoline or other hydrocarbon substances produced from any well or wells on said premises, or in lieu thereof, pay to lessor the market value thereof, as the Commissioners may elect; provided, however, the royalty due and payable under this lease shall not in any event be less than Two Dollars and Fifty Cents ($2.50) per acre as specified in Paragraph 3 of this contract. The lessee shall furnish to

the lessor certified copies of gauge tickets, sales, shipments and amounts of gross production, at its office in Oklahoma City, Oklahoma. Gas is to be metered on the premises under presure of 4 ounces above an assumed atmospheric pressure of 14.4 pounds per square inch at a temperature of 60 degrees Fahrenheit, or computed to that measurement.

3. Commencing at the first anniversary of the date of this lease after the completion of a well or wells producing or capable of producing oil or gas in paying quantities, lessee shall pay to lessor a royalty of not less than Two Dollars and Fifty Cents ($2.50) per acre per year, due and payable annually on or before the 25th day of the month following the end of each twelve months period thereafter during the life of this lease, provided that if oil or gas is being produced and taken from the leased premises and the royalty paid by the lessee thereon is less than the minimum royalty above specified, the difference between the amount so paid during any twelve months period between anniversaries of the date of the lease and the minimum annual royalty of Two Dollars and Fifty Cents ($2.50) per acre shall be paid by lessee to lessor on or before the 25th day of the month following the end of the yearly period in which such minimum royalty has accrued. Provided, further, that nothing herein shall be construed to excuse the commencement of production and marketing of oil or gas from the leased premises and the continuation of such production and marketing as required by other provisions of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to directly offset the wells upon adjoining contiguous premises, said offset wells to be commenced within sixty (60) days

after commencement of marketing from the well upon such adjoining contiguous premises unless a longer time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to the same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to faithfully comply with this provision shall be cause for forfeiture of this lease to the State.

5. At least one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date hereof, or failing so to do this lease shall terminate as to both parties, unless the lessee on or before the expiration of said one year period shall pay to the lessor, at its office in the State Capitol Building, Oklahoma City, Oklahoma, the sum of One Dollar ($1.00) per acre for the privilege of delaying the drilling and completion of such a well for an additional year. In like manner and upon like payments the completion of a well producing oil or gas in paying quantities may further be deferred for like periods successively not exceeding five (5) years from the date hereof, it being understood that the completion of a well producing oil or gas in paying quantities during the life of this lease shall relieve the lessee of all future liability for said One Dollar ($1.00) per acre rent hereunder, but the lessee shall nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided, until the lease is fully developed; and provided, further, that unless a well producing oil or gas in paying quantities is completed on the above described premises within five (5) years from the date hereof, this lease shall be void.

Filed for record this the 28 day of June, 1966 at 9 o'clock a.m.

6. The lessee shall carry on the development and operation in a workmanlike manner, commit no waste on said land, and suffer none to be committed upon the portion in his occupancy or use; take good care of the same, and promptly surrender and return the premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto, unavoidable casualty only excepted.

7. All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes than those authorized in the lease; and before abandoning any well, shall securely plug the same so as to effectually shut off water from the oil-bearing stratum, and in the manner required by the rules and regulations of the Oklahoma Corporation Commission and the laws of the State of Oklahoma.

8. The lessee shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duty sworn to by the contractor or driller, which shall be filed with the Secretary to the Commissioners of the Land Office within thirty (30) days after said well is completed. Accurate and reliable information concerning all wells and their operation and management shall be furnished to the Commissioners of the Land Office or their representatives upon demand. The said lessee shall also keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and

also upon all the unsold oil and gas obtained from the land herein leased as security for the payment of said royalties.

9. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface interests in said land, and to all crops and improvements thereupon, and appurtenances and hereditaments thereunto belonging by reason of the oil and gas mining operations hereunder, and in the event the amount of such damage cannot be agreed upon by the lessee hereof and such surface owner or lessee then the amount of such damage shall be determined as is or may be provided by law. The lessee hereof further agrees to pay all such damages within ten (10) days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

10. This lease shall be subject to the constitution and laws of the State of Oklahoma and the rules and regulations of the Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; Provided, That no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

11. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of the Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of the Commissioners of the Land Office, conditioned for the faithful performance of the convenants and conditions of this lease, and pay the assignment fee.

12. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

13. Upon the violation of any of the substantial terms or conditions of this lease, the Commissioners of the Land Office shall have the right at any time after hearing upon fifteen (15) days notice, given by registered mail to the last known address of such lessee, specifying the terms or conditions violated, to declare this lease null and void, provided any person affected thereby may appeal to the district court of the county where the land is situated; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

14. It is further agreed that for any refinery of crude oil and its products and by-products, owned and controlled by the State of Oklahoma, the State shall have the preference right to purchase and receive the output from said premises at the market price thereof; Provided, that this clause shall not prevent the lessee from selling the output of said lease to any person, firm or corporation whatsoever until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them, and all sales of oil and gas or either of them under this proviso shall be valid and binding.

15., The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of all liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and

release of the said lease with the Secretary to the Commissioners of the Land Office, Provided, that if such lease has been recorded in the county, the release thereof must be recorded in the county prior to filing with the Secretary to the Commissioners of the Land Office.

16. The surface owner or lessee of said premises shall have gas free of cost from any gas well on said premises for use of principal dwelling thereon by making his own connection with the well.

17. If lessor herein owns a less interest in the minerals in the heretofore described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which its mineral interest bears to the whole and undivided fee.

In WITNESS WHEREOF, the parties hereunto subscribed their signatures on the day and year first above written.

ATTEST: THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

Secretary of the Commissioners of the Land Office. /s/ James M. Bullard

Vice Chairman.

ATTEST: CITIES SERVICE OIL COMPANY

Lessee.

Secretary. By: E. E. Owen
Attorney-In-Fact

STATE OF OF OKLAHOMA,)
OKLAHOMA COUNTY,) ss.
)

Personally appeared before me, the undersigned Notary Public, within and for said County and State, James M. Bullard, to me known to be the person who subscribed the name of the Commissioners of the Land Office of the State of Oklahoma, to the foregoing instrument, as its Vice Chairman, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as free and voluntary act and deed of such Commissioners of the Land Office, for the use and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 8th day of March, 1966.

My Commission expires 10-7-67 /s/ Kitty H. Eaves
Notary Public

ACKNOWLEDGMENT FOR INDIVIDUAL

STATE OF OKLAHOMA,

* * *[STAMPED]* * *

My Commission expires

Notary Public

ACKNOWLEDGMENT FOR CORPORATION

STATE OF OKLAHOMA,)
WASHINGTON COUNTY,) ss.
)

Before me, Mary McCarty, a Notary Public in and for said State, on this 21st day of February, 1966, personally appeared E. E. Owen, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Attorney-in-Fact and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation for the uses and purposes therein set forth.

My Commission expires

Mary McCarty
Notary Public

[Filed June 28, 1966] 55478B
O.G.L.
COMMISSION OF HAND
TO
CITIES SERVICE OIL CO
2-8-66

STATE OF OKLAHOMA
COUNTY OF SEQUOYAH
This instrument was Filed for Record in
the County Clerk's Office

At 9 o'clock a. m., and is Recorded in Book No. 309
Page No. 563

JESS ROSS, County Clerk
Deputy

[Filed, January 31, 1967]

SEPARATE ANSWER OF THE DEFENDANT J. T. STEPHENS, DOING BUSINESS AS STEPHENS PRODUCTION COMPANY

Comes now this defendant, J. T. Stephens, doing business as Stephens Production Company, and for the purpose of his answer alleges and states:

I.

That J. T. Stephens is an individual doing business as Stephens Production Company and maintains an office at 115 North 12th Street, Fort Smith, Arkansas.

II.

That this defendant denies each and every allegation contained in plaintiff's complaint except those matters hereinafter specifically admitted.

III.

That this defendant is the owner of that certain oil and gas mining lease dated July 12, 1961, executed by The Commissioners of the Land Office of the State of Oklahoma, covering that part of the Arkansas River bed Section 33-1ON-25E, LeFlore and/or Sequoyah Counties, State of Oklahoma, and which lease is recorded in Book 384 at Page 533 of the records of the County Clerk, LeFlore County, Oklahoma, and in Book 271 at Page 28 of the records of the County Clerk, Sequoyah County, Oklahoma. That the lands covered by this lease are included in the producing unit known as the Redland Ranch No. 5 Unit comprising all of Section 33-1ON-25E, LeFlore and Sequoyah Counties, Oklahoma, and that said lease is a valid and subsisting lease being held in force by the production of natural gas from the Redland Ranch No. 5 well.

IV.

That this defendant is the owner of that certain oil and gas mining lease dated July 12, 1961, executed by the Commissioners of the Land Office of the State of Oklahoma, covering that part of the Arkansas River bed Section 28-1ON-25E, LeFlore and/or Sequoyah Counties, State of Oklahoma, and which lease is recorded in Book 384 at Page 454 of the records of the County Clerk, LeFlore County, Oklahoma, and in Book 269 at Page 363 of the records of the County Clerk, Sequoyah County, Oklahoma. That the lands covered by this lease are included in the producing unit known as the Hutchinson-Redland Ranch No. 6 Unit comprising all of Section 28-1ON-25E, LeFlore and Sequoyah Counties, Oklahoma, and that said lease is a valid and subsisting lease being held in force by the production of the natural gas from the Hutchinson-Redland Ranch No. 6 well.

V.

That this defendant is the owner of that certain oil and gas mining lease dated November 16, 1965, executed by The Commissioners of the Land Office of the State of Oklahoma, covering that part or portion of the following sections or parts of sections in the Arkansas River bed containing approximately 35 acres in LeFlore and/or Sequoyah Counties, State of Oklahoma, Section 18-1ON-26E and which lease is recorded in Record Book 308 at Page 391 of the records of the County Clerk, Sequoyah County, Oklahoma. That this lease is a valid and subsisting lease being held in force by the payment of delay rentals as therein specified.

VI.

That this defendant is the owner of that certain oil and gas mining lease dated February 8, 1966, executed by The Commissioners of the Land Office of the State

of Oklahoma, covering that part or portion of the following sections or parts of sections in the Arkansas River bed containing approximately 120 acres in the LeFlore and/or Sequoyah Counties, State of Oklahoma, Section 24-1ON-25E, and which lease is recorded in Book 308 at Page 388 in the records of the County Clerk, Sequoyah County, Oklahoma. That this lease is a valid and subsisting lease being held in force by the payment of the delay rentals as therein specified.

WHEREOF, the defendant, J. T. Stephens, doing business as Stephens Production Company, prays that the Court find that he is the true owner of all oil and gas mining leases herein set forth and described and that this defendant be granted all other relief to which he may be entitled.

By /s/ Spence A. Leamons
115 North 12th Street
Fort Smith, Arkansas 72901

Attorney for J. T. Stephens, d/b/a
Stephens Production Company

[Filed, January 31, 1967]

ANSWER

Mobil Oil Corporation and Skelly Oil Company now answer the Complaint as follows:

1. These defendants admit the jurisdiction of this Court as alleged in Paragraph I of the Complaint and under Section 18 of the Act of April 26, 1906 (34 Stat. 137) as construed in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, and these defendants further invoke jurisdiction of this Court under 28 U.S.C.A., Section 1331, as a matter which arises under certain laws and

treaties of the United States as set out in Paragraph II of the Complaint.

2. These defendants admit the matters contained in Paragraphs II and IV of the Complaint reserving the right to object to their relevancy and accuracy after comparison with the original documents.

3. These defendants specifically deny the allegations contained in Paragraphs III, V, VI, and VII.

COUNTER CLAIM

These defendants allege that upon the admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

Defendant Mobil Oil Corporation further alleges that it is the owner of ten valid oil and gas leases dated November 16, 1965, purchased for valuable consideration from the State of Oklahoma covering the natural bed of the Arkansas River below high-water mark insofar as such bed lies within Sections 27, 31, 32, 33 and 34, Township 11 North, Range 27 East; Sections 4, 5, 6, 7 and 8, Township 10 North, Range 27 East, in LeFlore and Sequoyah Counties, Oklahoma.

Defendant Skelly Oil Company further alleges that it is the owner of four valid oil and gas leases dated November 16, 1965, purchased for valuable consideration from the State of Oklahoma covering the natural bed of the Arkansas River below high-water mark insofar as such bed lies within Section 13, Township 10 North,

Range 26 East; Sections 17 and 18, Township 10 North, Range 27 East; and Section 10, Township 9 North, Range 25 East, in LeFlore and Sequoyah Counties, Oklahoma.

These defendants further allege that the purported claim of plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State and on the title of these defendants as lessees of the State of Oklahoma.

WHEREFORE, these defendants pray that plaintiff take nothing by reason of its Complaint and that these defendants by reason of their Counter Claims have judgment herein quieting their leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections, and for the possession thereof and for such other and further relief as the Court may deem just and proper.

SKELLY OIL COMPANY
By McAfee, Dudley, Taft, Cates & Mark
Attorneys

By /s/ Judson S. Woodnuff

MOBIL OIL CORPORATION
By /s/ Robert W. Richards
S. M. Groom, Jr.,
Its Attorneys
S. M. Groom, Jr.

[Filed, January 31, 1967]

ANSWER OF DEFENDANT CONTINENTAL OIL COMPANY

1. Defendant, Continental Oil Company, admits the allegations contained in Paragraphs I, II, and IV of the Complaint on file herein.

2. Said defendant denies the allegations contained in Paragraphs III, V, and VI of the Complaint on file herein.

3. Said defendant admits that many leases and contracts covering portions of the Arkansas River bed have been entered into in good faith by various persons, firms, and corporations with the defendants, State of Oklahoma and the Commissioners of the Land Office of the State of Oklahoma, as alleged in Paragraph VII of the Complaint on file herein, but said defendant denies the remaining allegations of Paragraph VII.

WHEREFORE, defendant, Continental Oil Company, prays that plaintiff take nothing under its Complaint, and that judgment be entered for said defendant for such relief as the Court may deem proper.

CONTINENTAL OIL COMPANY

By /s/ Richard R. Linn
Robert E. Gill, Jr.
Its Attorneys
P. O. Box 795
Oklahoma City, Oklahoma, 73101

[Filed, February 1, 1967]

ANSWER OF DEFENDANT SUN OIL COMPANY

1. Defendant, Sun Oil Company, admits the allegations contained in Paragraphs I, II, and IV of the Complaint on file herein.

2. Said defendant denies the allegations contained in Paragraphs III, V, and VI of the Complaint on file herein.

3. Said defendant admits that many leases and contracts covering portions of the Arkansas River bed have

been entered into in good faith by various persons, firms, and corporations with the defendants, State of Oklahoma and the Commissioners of the Land Office of the State of Oklahoma, as alleged in Paragraph VII of the Complaint on file herein, but said defendant denies the remaining allegations of Paragraph VII.

WHEREFORE, defendant, Sun Oil Company, prays that plaintiff take nothing under its Complaint, and that judgment be entered for said defendant for such relief as the Court may deem proper.

SUN OIL COMPANY
By /s/ William C. Phelps
Its Attorney
P. O. Box 1348
Tulsa, Oklahoma 74101.

[Filed February 1, 1967]

ANSWER, COUNTERCLAIM AND CROSS-CLAIM OF DEFENDANT, STEVE GOSE

ANSWER

COMES NOW defendant Steve Gose and, for his answer to the Complaint of the plaintiff, alleges and states:

1. That this answering defendant denies each and every allegation contained in plaintiff's Complaint except those matters hereinafter specifically admitted.

2. That this defendant admits the matters contained in paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

COUNTERCLAIM AND CROSS-CLAIM

Defendant Steve Gose, for his counterclaim against the plaintiff and his cross-claim against all defendants herein, alleges and states:

1. That this defendant is the owner of a valid and subsisting oil and gas lease from the State of Oklahoma, as lessor, to defendant Humble Oil & Refining Company as lessee, which lease is dated May 31, 1961, and covers the natural bed of the Arkansas River below the high water mark insofar as such bed lies within Section 24, Township 10 North, Range 23 East, Haskell and Sequoyah Counties, State of Oklahoma, down to the base of the Spiro formation, which oil and gas lease is subject to bear an overriding royalty of 1/8th of 7/8ths of total production, which overriding royalty interest is owned by defendant Humble Oil & Refining Company.

2. That the purported claim of plaintiff is without merit and constitutes a cloud on the title of this defendant; that the claims of all defendants herein in and to the above described premises are inferior and subject to the oil and gas leasehold estate of this defendant.

WHEREFORE, defendant Steve Gose prays that plaintiff take nothing by reason of its Complaint and that this defendant, by reason of its counterclaim and cross-claim, have judgment herein quieting its title as above set forth against all parties hereto, and for such other and further relief as the Court may deem just and reasonable.

WALKER & WATSON

By /s/ H. B. Watson, Jr.

Attorneys for Defendant
Steve Gose

[Filed February 1, 1967]

ANSWER, COUNTERCLAIM AND CROSS-CLAIM OF DEFENDANT, UNION OIL COMPANY OF CALIFORNIA

ANSWER

COMES NOW defendant Union Oil Company of California and, for its answer to the complaint of the plaintiff, alleges and states:

1. That this answering defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California and duly domesticated and authorized to do business under the laws of the State of Oklahoma; that defendant Union Oil Company of California is successor by merger to The Pure Oil Company, an Ohio corporation.

2. That this answering defendant denies each and every allegation contained in plaintiff's Complaint except those matters hereinafter specifically admitted.

3. That this defendant admits the matters contained in paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

COUNTERCLAIM AND CROSS-CLAIM

Defendant Union Oil Company of California, for its counterclaim against the plaintiff and its cross-claim against all defendants herein, alleges and states:

1. That this defendant is the owner of three valid and subsisting oil and gas leases from the State of Oklahoma, as lessor, to this defendant, as lessee, all of which are dated November 16, 1965, and cover the natural bed of the Arkansas River below the high water mark, insofar as

such bed lies within Sections 16, 20 and 30, Township 10 North, Range 26 East, LeFlore and Sequoyah Counties, State of Oklahoma. That the oil and gas lease covering lands in said Section 16 is subject to a farmout agreement by and between this defendant and defendant Stephens Petroleum Company.

2. That this defendant is the owner of a valid and subsisting oil and gas lease from the State of Oklahoma, as lessor, to defendant Humble Oil & Refining Company as lessee, which lease is dated July 12, 1961, and covers the natural bed of the Arkansas River below the high water mark insofar as such bed lies within Section 32, Township 10 North, Range 25 East, LeFlore and Sequoyah Counties, State of Oklahoma, which oil and gas lease is subject to bear an overriding royalty of 1/8th of 7/8ths of total production, which overriding royalty interest is owned by defendant Humble Oil & Refining Company.

3. That the purported claim of plaintiff is without merit and constitutes a cloud on the title of this defendant; that the claims of all defendants herein in and to the above described premises are inferior and subject to the oil and gas leasehold estate of this defendant.

WHEREFORE, defendant Union Oil Company of California prays that plaintiff take nothing by reason of its Complaint and that this defendant, by reason of its counterclaim and cross-claim, have judgment herein quieting its title as above set forth against all parties hereto, and for such other and further relief as the Court may deem just and reasonable.

WALKER & WATSON

By /s/ H. B. Watson, Jr.

Attorneys for Defendant
Union Oil Company of California

[Filed, February 1, 1967]

ANSWER OF DEFENDANT PAN AMERICAN PETROLEUM CORPORATION

1. Defendant, Pan American Petroleum Corporation, admits the allegations contained in Paragraphs I, II and IV of the Complaint.

2. Said defendant denies the allegations contained in Paragraphs III, V and VI of the Complaint.

3. Answering Paragraph VII of the Complaint, this defendant states that it owns Oil and Gas Mining Lease dated February 8, 1966, purchased from the Commissioners of the Land Office of the State of Oklahoma, acting for and on behalf of the State of Oklahoma, which lease covers the Arkansas River bed insofar as such bed lies within Section 15, Township 9 North, Range 25 East, LeFlore and/or Sequoyah Counties, Oklahoma, and contains fifteen (15) acres, more or less, that said lease was purchased for valuable consideration, in good faith, in reliance of the ownership thereof by the State of Oklahoma; that this defendant is not fully informed as to whether various persons, firms and other corporations have similarly purchased leases covering other portions of the Arkansas River bed and therefore neither admits nor denies the same, that said defendant denies the remaining allegations of Paragraph VII.

That the purported claim of plaintiff herein is without merit and constitutes a cloud on the title of the defendant as such lessee of the State of Oklahoma.

WHEREFORE, defendant, Pa
Corporation, prays that plaintif
Complaint, and that judgment
fendant for such relief as the Co

American Petroleum
e nothing under its
entered for said de-
eems proper.

PAN AME
CORPO
AN PETROLEUM
By /s/ J. HON
Harry C
P. O. B
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ty, Oklahoma 73101

[Filed, February 1, 1967]

ANSWE

Jeffrey Sand Company, an A
its principal office in the city
for its answer to the complaint

s corporation with
t Smith, Arkansas,
states:

1. This defendant admits the
as alleged in Paragraph I of t
Section 18 of the Act of April
as construed in *Choctaw and C*
193 F.2d 456, and this defend
diction of this Court under 28
a matter which arises under cert
United States as set out in P
plaint.

ction of this Court
mplaint and under
906 (34 Stat. 137)
w Nations v. Seitz,
rther invokes juris-
.., Section 1331, as
s and treaties of the
h II of the Com-

2. This defendant admits the matters contained in Paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

3. This defendant specifically denies the allegations contained in Paragraphs III, VI, and VII.

COUNTERCLAIM

This defendant alleges that upon the admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This defendant further alleges that it is the owner of two valid sand and gravel leases dated May 28, 1963, and July 28, 1964, purchased for valuable consideration from the State of Oklahoma, covering the natural bed of the Arkansas River below high-water mark insofar as such bed lies within Sections 1, 2, 12 and 13, Township 12 North, Range 20 East, and Sections 7, 17, 18, 19, 20, 28 and 29, Township 12 North, Range 21 East, situated in Muskogee and Sequoyah Counties, and Sections 8, 9, 10, 11, 17, 18, 19 and 20, Township 10 North, Range 24 East, and Sections 25, 35 and 36, Township 10 North, Range 25 East, and Sections 19, 20, 21, 25, 26, 27 and 28, Township 10 North, Range 26 East, situated in LeFlore and Sequoyah Counties, Oklahoma.

This defendant further alleges that the purported claim of plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State and on the title of this defendant as lessee of the State of Oklahoma.

WHEREFORE, this defendant prays that plaintiff take nothing by reason of its Complaint, and that this defendant by reason of its Counterclaim have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections, and for the possession thereof, and for such other and further relief as the Court may deem just and proper.

JEFFREY SAND COMPANY

By Warner, Warner, Ragon & Smith
214 North Sixth Street
Fort Smith, Arkansas 72901

By /s/ H. P. Warner
Its Attorneys

[Filed, February 1, 1967]

ANSWER OF DEFENDANT, EASON OIL COMPANY

I.

Defendant, Eason Oil Company, a corporation, for answer to the complaint filed herein, states:

1. Defendant is without knowledge of the allegations of Paragraphs I and II thereof; therefore denies same and demands proof thereof.

2. Defendant denies the allegations of Paragraphs III, V, and VI thereof.

3. Defendant denies that the allegations of Paragraph IV are material herein.

4. As regards Paragraph VII, answering defendant alleges that it is a corporation, that it purchased an oil and gas lease from the Commissioners of the Land Office of the State of Oklahoma, dated November 10, 1964, recorded in book 436, page 151 of the records of the County Clerk of LeFlore County, Oklahoma, a copy of which is attached hereto, marked Exhibit "A", and made a part hereof by reference; that the leased premises are shown on the plat attached hereto, marked Exhibit "B", and made a part hereof. Answering defendant alleges that said lease is a valid lease and superior to any claim which plaintiff might have in or to the leased premises.

5. Answering defendant further alleges that the property which it has under lease from the Commissioners of the Land Office is a portion of the bed of the Arkansas River, a navigable river, which was abandoned by avulsion; that the title thereto remained in the State of Oklahoma, and that answering defendants lease is therefore valid and subsisting, and superior to any claim of the plaintiff or any defendant herein, with the exception of the State of Oklahoma, and Commissioners of the Land Office.

WHEREFORE, defendant, Eason Oil Company, a corporation, prays that plaintiff take nothing as against this defendant by reason of its complaint, and that answering defendant recover its costs herein.

JAY R. BOND
Ross, Holtzendorff & Bond
1619 First National Building
Oklahoma City, Oklahoma 73102

Attorneys for Defendant,
EASON OIL COMPANY, A
CORPORATION

Tract No. 11
11-9-1964 Sale
Lease No. 40 & 68-CS-10149

Received
November 18, 1964
Land Office

EXHIBIT A

THE STATE OF OKLAHOMA
OIL AND GAS MINING LEASE

THIS LEASE, Made and entered into in duplicate, on this 10th day of November, A.D., 1964, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Eason Oil Company, party of the second part, hereinafter designated as lessee, whose post office address is P. O. Box 9755, Oklahoma City, Oklahoma. Under and in pursuance of the provisions of the Constitution and Laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and leasing thereof on school and other public lands belonging to the State of Oklahoma, WITNESSETH:

1. The Lessor, for and in consideration of twelve thousand six hundred sixty six dollars and fifty four cents ($12,666.54) DOLLARS, the receipt of which is hereby acknowledged, and the rents and royalties to be paid, and the covenants, stipulations and conditions to be observed and performed as herein set forth, does hereby demise, lease and let unto the lessee for a term of five (5) years from the date hereof and as long thereafter as oil or gas or either of them is produced in paying quantities, the following described tract(s) of land situated in the County of LeFlore and Sequoyah Counties, in the State of Oklahoma, to-wit:

That part or portion of Section 4, located in the Arkansas River Bed containing the approximate acreage set out below, Section 4, 9N-25E

containing 114 acres, more or less, and does hereby grant to the lessee the exclusive right and privilege to prospect and drill for, mine and extract all of the oil and natural gas deposits in or under said land, together with the right to pipe, store, and remove oil and natural gas and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing, and removing such oil, distillate, and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil, gas and casinghead gas for fuel so far as necessary to the development and operation of said property.

2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, without cost into pipe lines, a royalty of one-eighth (1/8) part of the oil or gas produced from the leased premises and a one-eighth (1/8) part of all casinghead or drip gas or gasoline or other hydrocarbon substances produced from any well or wells on said premises, or in lieu thereof, pay to lessor the market value thereof, as the Commissioners may elect; provided, however, the royalty due and payable under this lease shall not in any event be less than Two Dollars and Fifty Cents ($2.50) per acre as specified in Paragraph 3 of this contract. The lessee shall furnish to the lessor certified copies of gauge tickets, sales, shipments, and amounts of gross production, at its office in Oklahoma City, Oklahoma. Gas is to be metered on the premises under pressure of 4 ounces above an assumed atmospheric pressure of 14.4 pounds per square inch at a temperature of 60 degrees Fahrenheit, or computed to that measurement.

3. Commencing at the first anniversary of the date of this lease after the completion of a well or wells producing or capable of producing oil or gas in paying quantities, lessee shall pay to lessor a royalty of not less than Two Dollars and Fifty Cents ($2.50) per acre per year, due and payable annually on or before the 25th day of the month following the end of each twelve months period thereafter during the life of this lease, provided that if oil or gas is being produced and taken from the leased premises and the royalty paid by the lessee thereon is less than the minimum royalty above specified, the difference between the amount so paid during any twelve months period between anniversaries of the date of the lease and the minimum annual royalty of Two Dollars and Fifty Cents ($2.50) per acre shall be paid by lessee to lessor on or before the 25th day of the month following the end of the yearly period in which such minimum royalty has accrued. Provided, further, that nothing herein shall be construed to excuse the commencement of production and marketing of oil or gas from the leased premises and the continuation of such production and marketing as required by other provisions of this lease.

4. The lessee shall exercise diligence in sinking wells for oil and natural gas on the land covered by this lease, and shall drill a sufficient number of wells to directly offset the wells upon adjoining contiguous premises, said offset wells to be commenced within sixty (60) days after commencement of marketing from the well upon such adjoining contiguous premises unless a longer time is prescribed by notice in writing from the lessor, and be prosecuted diligently and continuously until completed; and the said lessee shall operate the leased premises for oil and gas to the same extent as individual and corporate premises are being operated within the general oil and gas fields where such land is located, and failure to

faithfully comply with this provision shall be cause for forfeiture of this lease to the State.

5. At least one well producing oil or gas in paying quantities shall be drilled and completed within one year from the date hereof, or failing so to do this lease shall terminate as to both parties, unless the lessee on or before the expiration of said one year period shall pay to the lessor, at its office in the State Capitol Building, Oklahoma City, Oklahoma, the sum of One Dollar ($1.00) per acre for the privilege of delaying the drilling and completion of such a well for an additional year. In like manner and upon like payments the completion of a well producing oil or gas in paying quantities may further be deferred for like periods successively not exceeding five (5) years from the date hereof, it being understood that the completion of a well producing oil or gas in paying quantities during the life of this lease shall relieve the lessee of all future liability for said One Dollar ($1.00) per acre rent hereunder, but the lessee shall nevertheless remain obligated to drill an offset, or necessary offsets, and other wells necessary to the proper development and operation of said lease as herein otherwise provided, until the lease is fully developed; and provided, further, that unless a well producing oil or gas in paying quantities is completed on the above described premises within five (5) years from the date hereof, this lease shall be void.

6. The lessee shall carry on the development and operation in a workmanlike manner, commit no waste on said land, and suffer none to be committed upon the portion of his occupancy or use; take good care of the soil, and promptly surrender and return the premises upon the termination of this lease to the lessor, or to whomsoever shall be lawfully entitled thereto, unavoidable casualty only excepted.

7. All tools, derricks, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery, and the casing of all dry or exhausted wells, shall remain the property of the lessee, and may be removed at any time prior to or at the termination of the lease by forfeiture or otherwise; and the lessee shall not permit any nuisance to be maintained on the premises; and shall not use said premises for any purposes than those authorized in the lease; and before abandoning any well, shall securely plug the same so as to effectually shut off water from the oil-bearing stratum, and in the manner required by the rules and regulations of the Oklahoma Corporation Commission and the laws of the State of Oklahoma.

8. The lessee shall keep an accurate account of all oil and gas mining operations, including a log of each well drilled, duly sworn to by the contractor or driller, which shall be filed with the Secretary to the Commissioners of the Land Office within thirty (30) days after said well is completed. Accurate and reliable information concerning all wells and their operation and management shall be furnished to the Commissioners of the Land Office or their representatives upon demand. The said lessee shall also keep an accurate account showing the sales, prices, dates, purchases, and the whole amount of oil and gas mined or removed, and all sums due as royalties shall be a lien on the implements, tools and movable machinery or personal chattels used in operating said property, and also upon all the unsold oil and gas obtained from the land herein leased as security for the payment of said royalties.

9. The lessee shall be liable to the surface owner or surface lessee for all damages or loss accruing to the surface interests in said land, and to all crops and improvements thereupon, and appurtenances and hereditaments thereunto belonging by reason of the oil and gas

mining operations hereunder, and in the event the amount of such damage cannot be agreed upon by the lessee hereof and such surface owner or lessee then the amount of such damage shall be determined as is or may be provided by law. The lessee hereof further agrees to pay all such damages within ten (10) days after the amount thereof is determined, and the amount of such damages may be recovered from the lessee hereof and his sureties upon the bond given to secure the faithful performance of this lease.

10. This lease shall be subject to the constitution and laws of the State of Oklahoma and the rules and regulations of the Commissioners of the Land Office now or hereafter in force relative to such leases; all of which are made a part and condition of this lease; Provided, That no regulations made after the execution of this lease affecting either the length of the term hereof, the rate of royalty, or payment hereunder or the assignment hereof, shall operate to affect the terms and conditions of this lease.

11. No transfer or assignment of this lease or any part thereof, shall be valid, or convey any right in the assignee without the consent in writing of the Commissioners of the Land Office; and such assignee shall furnish a bond to the satisfaction of the Commissioners of the Land Office, conditioned for the faithful performance of the covenants and conditions of this lease, and pay the assignment fee.

12. Before this lease shall be in force and effect the lessee shall give a good and sufficient bond, to be approved by the Commissioners of the Land Office, for the faithful performance of this lease.

13. Upon the violation of any of the substantial terms or conditions of this lease, the Commissioners of the Land Office shall have the right at any time after hearing

upon fifteen (15) days notice, given by registered mail to the last known address of such lessee, specifying the terms or conditions violated, to declare this lease null and void, provided any person affected thereby may appeal to the district court of the county where the land is situated; and the said Commissioners for and on behalf of the State of Oklahoma, shall be entitled to recover from the lessee's bondsmen, all rents, royalties, charges, claims of every kind and nature due and owing and accruing and arising out of and by reason of this lease, on failure to comply with the provisions thereof, and the lessors shall be entitled and authorized to take immediate possession of the land.

14. It is further agreed that for any refinery of crude oil and its products and by-products, owned and controlled by the State of Oklahoma, the State shall have the preference right to purchase and receive the output from said premises at the market price thereof; Provided, that this clause shall not prevent the lessee from selling the output of said lease to any person, firm or corporation whatsover until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas or either of them, and all sales of oil and gas or either of them under this proviso shall be valid and binding.

15. The lessee may at any time hereafter surrender and wholly terminate this lease upon payment of all liabilities then accrued and due hereunder, and may exercise such right by filing a formal relinquishment and release of the said lease with the Secretary to the Commissioners of the Land Office, Provided, that if such lease has been recorded in the county, the release thereof must be recorded in the county prior to filing with the Secretary to the Commissioners of the Land Office.

16. The surface owner or lessee of said premises shall have gas free of cost from any gas well on said premises

for use of principal dwelling thereon by making his own connection with the well.

17. If lessor herein owns a less interest in the minerals in the heretofore described land than the entire and undivided fee simple estate therein, then the royalties and rentals herein provided shall be paid the lessor only in the proportion which its mineral interest bears to the whole and undivided fee.

In WITNESS WHEREOF, the parties hereunto subscribed their signatures on the day and year first above written.

Attest: THE COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA

/s/ (Illegible Signature) /s/ James M. Bullard
Secretary to the Commissioners of the Land Office.

ATTEST: EASON OIL COMPANY

/s/ F. Clark Lessee.

Assistant-Secretary. By /s/ T. Winston Eason, President.

STATE OF OKLAHOMA,
OKLAHOMA COUNTY,

Personally appeared before me, the undersigned Notary Public, within and for said County and State , James M. Bullard, to me known to be the person who subscribed the name of the Commissioners of the Land Office of the State of Oklahoma, to the foregoing instrument, as its Vice-Chairman, and acknowledged to me that he executed the same as his free and voluntary act and deed, and as free and voluntary act

and deed of such Commissioners of the Land Office, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 24th day of November, 1964.

My Commission expires 10-7-67

Kitty H. Eaves
Notary Public.

ACKNOWLEDGMENT FOR INDIVIDUAL

STATE OF OKLAHOMA,
COUNTY,

Personally appeared before me, the undersigned Notary Public, within and for said County and State , , to me known to be the identical person who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed, for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this day of , 19 .

My Commission expires

Notary Public.

ACKNOWLEDGMENT FOR CORPORATION

STATE OF OKLAHOMA,
OKLAHOMA COUNTY,

Personally appeared before me, the undersigned Notary Public, within and for said County and State, T. Winston Eason, to me known to be the identical person who signed the name of the Lessee, Eason Oil Company to the above and foregoing instruments as its President, and acknowledged that he executed the same

as his free and voluntary act and deed, and as the free and voluntary act and deed of the said corporation for the uses and purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal on this 17th day of November, 1964.

My Commission expires March 16, 1968.

Beatrice Gayman
Oklahoma City, Oklahoma
Notary Public.

EXHIBIT B

[Filed, February 1, 1967]

ANSWER OF LONE STAR PRODUCING COMPANY

The defendant Lone Star Producing Company, a corporation, for its answer to the complaint herein, avers and states:

1. This defendant admits the allegations contained in numerical paragraphs I, II and IV of said complaint.

2. This defendant denies the allegations contained in numerical paragraphs III, V and VI of the complaint.

3. Further answering, this defendant admits that many leases and other contracts covering portions of the Arkansas River Bed within the area involved in this action have been entered into in good faith by various persons, firms and corporation with the State of Oklahoma and the Commissioners of the Land Office of said state, as alleged in numerical paragraph VII of the complaint; but this defendant denies all other allegations of fact or conclusions set forth in such paragraph.

WHEREFORE, this answering defendant prays that the relief sought by the plaintiff herein be denied.

And this defendant prays that it have such other and further relief as the court may find and determine to be just, meet and proper in the premises.

GERALD R. JENKINS
301 South Harwood Street
Dallas, Texas

By /s/ O. L. Lupardus
Suite 510 Oklahoma Natural Building
Tulsa, Oklahoma 74119

Attorneys for said Defendant

[Filed February 1, 1967]

ANSWER

The State of Oklahoma, ex rel. G. T. Blankenship, Attorney General, answers the Complaint as follows:

I.

This defendant admits the jurisdiction of this Court as alleged in Paragraph I of the Complaint and under Section 18 of the Act of April 26, 1906 (34 Stat. 137) as construed in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456, and this defendant further invokes jurisdiction of this Court under 28 U.S.C.A., Section 1331, as a matter which arises under certain laws and treaties of the United States as set out in Paragraph II of the Complaint.

II.

This defendant admits the matters contained in Paragraphs II and IV of the Complaint reserving the right to object to their relevancy and accuracy after comparison with the original documents.

III.

This defendant specifically denies the allegations contained in Paragraphs III, V, VI, and VII of the Complaint.

COUNTER CLAIM

This defendant alleges that upon the admission of the State of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkan-

sas River was navigable and that part of the river bed described in plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This defendant further alleges that the purported claim of plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State of Oklahoma.

WHEREFORE, this defendant prays that plaintiff take nothing by reason of its Complaint and that this defendant by reason of its Counter Claim have judgment herein quieting its title to the bed of the Arkansas River as described in the Complaint, and for the possession thereof and for such other and further relief as the Court may deem just and proper.

STATE OF OKLAHOMA, EX REL
G. T. BLANKENSHIP,

Attorney General

By /s/ M. Darwin Kirk
Assistant to Attorney General

[Filed, February 1, 1967]

ANSWER OF HUMBLE OIL & REFINING COMPANY

COMES NOW Defendant Humble Oil & Refining Company, a Delaware corporation, and for answer to the Complaint filed herein, states:

I.

This Defendant admits the jurisdiction of this Court as alleged in Paragraph I of the Complaint under Section 18 of the Act of April 26, 1906 (34 Stat. 137) as construed in *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d

456, and this Defendant further invokes jurisdiction of this Court under 28 U.S.C.A., Section 1331, as a matter which arises under certain laws and treaties of the United States as set out in Paragraph II of the Complaint.

II.

This Defendant admits the matters contained in Paragraphs II and IV of the Complaint, reserving the right to object to their relevancy and accuracy after comparison with the original documents.

III.

This Defendant specifically denies each and every allegation contained in Paragraphs III, V and VI of said Complaint, except those allegations hereinafter specifically admitted.

IV.

In respect to Paragraph VII of said Complaint, this Defendant admits that it has acquired certain Oil & Gas Leases from the Commissioners of the Land Office of the State of Oklahoma acting for and in behalf of the State of Oklahoma covering portions of said Arkansas River bed, hereinafter more specifically described, in reliance on the force and effect of certain decisions of the Supreme Court of the State of Oklahoma, but this Defendant specifically denies all of the remaining allegations contained in said Paragraph VII relating to relief to which Plaintiff alleges it is entitled in this action.

COUNTER CLAIM

This Defendant alleges that upon the admission of Oklahoma into the Union, the title to the bed of the Arkansas River below high-water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas

River was navigable and that part of the river bed described in Plaintiff's Complaint is now and has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This Defendant further alleges that it is the owner and holder of the following described valid Oil & Gas Leases now in full force and effect:

a. Lease dated November 16, 1965, executed by the Commissioners of the Land Office of the State of Oklahoma, as lessor, to Humble Oil & Refining Company, as lessee, covering the following described lands in LeFlore and/or Sequoyah Counties, Oklahoma, to-wit:

> That part or a portion of the following sections or parts of sections in the Arkansas River bed containing the approximate acreage set opposite the described sections in LeFlore and/or Sequoyah Counties, Section 28-10N-26E, containing 275 acres, more or less.

b. Oil & Gas Lease dated May 31, 1961, executed by the Commissioners of the Land Office of the State of Oklahoma, as lessors, to Humble Oil & Refining Company, as lessee, covering the following described land situated in Haskell and/or Sequoyah Counties, Oklahoma, to-wit:

> That part of the Arkansas river bed, Section 24-10N-23E, containing 204 acres, more or less, insofar as said lease covers all rights below the base of the Spiro Sand Formation in and under said land together with an overriding royalty of 1/8 of 7/8 of all oil, gas, casinghead gas, condensate and other minerals which may be produced from said land from the surface thereof down to the base of the Spiro Sand Formation.

Said lease is recorded in Book 202 at Page 760 in the records of Haskell County, Oklahoma, and in Book 266 at Page 339 in the records of Sequoyah County, Oklahoma.

c. Oil & Gas Lease dated July 12, 1961, executed by the Commissioners of the Land Office of the State of Oklahoma, as lessor, to Humble Oil & Refining Company, as lessee, covering the following described lands in LeFlore and/or Sequoyah Counties, State of Oklahoma, to-wit:

> That part of the Arkansas river bed, Section 32-1ON-25E, containing 136 acres, more or less, insofar as said lease covers all leasehold rights below the base of the Atoka Formation in and under said lands together with an overriding royalty interest of 1/8 or 7/8 of all oil, gas, casinghead gas and other minerals which may be produced from said land from the surface thereof down to the base of the Atoka Formation,

which said Oil & Gas Lease is recorded in Book 266 at Page 351 in the records of Sequoyah County, Oklahoma, and in Book 385 at Page 220 in the records of LeFlore County, Oklahoma.

This Defendant further alleges that the purported claim of Plaintiff Cherokee Nation is without merit and constitutes a cloud on the title of the State and on the title of this Defendant as lessee of the State of Oklahoma.

WHEREFORE, this Defendant prays that Plaintiff take nothing by reason of its Complaint and that this Defendant by reason of its Counter Claim have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in the Complaint, insofar as such bed lies within the above described sections, and for the

possession thereof and for such other and further relief as the Court may deem just and proper.

HUMBLE OIL & REFINING COMPANY

2000 Classen Center North
Oklahoma City, Oklahoma 73106

By /s/ Albert C. McClain
Varley H. Taylor

Its Attorneys

[Filed, February 1, 1967]

ANSWER

Comes now Marathon Oil Company and for answer to the Complaint herein states:

1. This Defendant admits the jurisdiction of the Court as alleged in Paragraph I of the Complaint;

2. This Defendant admits the matters contained in Paragraph II and IV of the Complaint reserving the right to object to the relevancy and accuracy of such matters after examination of and comparison with the original documents;

3. This Defendant specifically denies the allegations contained in Paragraphs III, V, VI and VII of the Complaint.

COUNTER CLAIM

This Defendant alleges that upon the admission of the State of Oklahoma into the Union, the title to the bed

of the Arkansas River below the high water mark within its borders passed to and became the property of the State of Oklahoma by operation of law where the said Arkansas River was navigable and that part of the river bed described in Plaintiff's Complaint is now and always has been since Oklahoma was admitted to the Union the property of the sovereign State of Oklahoma.

This Defendant further alleges that it is the owner of a certain oil and gas mining lease dated November 16, 1965, purchased for valuable consideration from the State of Oklahoma covering the bed of the Arkansas River below the high water mark, insofar as said bed lies within Section 35, Township 10 North, Range 25 East, in LeFlore and/or Sequoyah Counties, Oklahoma.

This Defendant further alleges that it is the owner of other interests in land lying within the lands described by Plaintiff's Complaint and that said interests were purchased for valuable consideration from the record title owners of said interests as shown by the official land records of the counties wherein said interests are situated within the State of Oklahoma.

This Defendant further alleges that the purported claim of Plaintiff, Cherokee Nation, is without merit and constitutes a cloud on the title of the State of Oklahoma and on the title of this defendant as lessee of the State of Oklahoma, and as lessee of other record title owners of lands within the State of Oklahoma.

WHEREFORE, this Defendant prays that Plaintiff take nothing by its Complaint and that this Defendant, by reason of its Counter Claim, have judgment herein quieting its leasehold title to the bed of the Arkansas River as described in said Complaint insofar as said bed lies within Section 35, Township 10 North, Range 25 East, State of Oklahoma, and insofar as Plaintiff's Complaint might cloud its title to other interests in land which it may

own in the lands described in Plaintiff's Complaint lying within the State of Oklahoma, and for quiet and peaceful possession thereof and for such other and further relief as the Court may deem just, equitable and proper.

MARATHON OIL COMPANY

By /s/ Riley B. Fell, Attorney

/s/ Eugene A. Hoefling, Attorney

/s/ David O. Cordell, Attorney

/s/ O. L. Hasty, Attorney

[Filed, February 2, 1967]

ANSWER

The Commissioners of the Land Office of the State of Oklahoma now answer the Complaint as follows:

1. These defendants admit the jurisdiction of the court as alleged in Paragraph I of the complaint.

2. These defendants admit the matters contained in Paragraphs II and IV of the complaint, reserving the right to object to their materiality, relevance and accuracy.

3. These defendants specifically deny the allegations of Paragraphs III, V, VI and VII.

Wherefore, having fully answered herein, these defendants pray that plaintiff take nothing by reason of its complaint.

THE COMMISSIONERS OF THE
LAND OFFICE OF THE STATE
OF OKLAHOMA

By /s/ Harvey H. Cody

/s/ N. A. Gibson

/s/ R. R. Williamson, Jr.

State Capitol, Okla. City, Okla., 73105
Their Attorneys.

[Filed, February 3, 1967]

MOTION FOR LEAVE TO AMEND COMPLAINT

Comes now the plaintiff and moves the Court for an order permitting it to amend the complaint by interlineation to correct a clerical error and to show the true name of one of the defendants as Lone Star Producing Co. in lieu of the present description of said defendant as Lone Star Production Co.

Cherokee Nation or Tribe of Indians
in Oklahoma

By /s/ Andrew Wilcoxen
114 North 5th St.,
Muskogee, Oklahoma.

Attorney for Plaintiff.

[Filed, February 3, 1967]

ORDER

Now on this 3rd day of February, 1967 on application of the plaintiff for leave to amend the complaint by interlineation to correct a clerical error in the description of one of the defendants, the Court being fully advised in the premises grants leave to amend said complaint by changing the name of one of the defendants from Lone Star Production Co. to Lone Star Producing Co. as in said application prayed.

/s/ Edwin Langley
Judge

[Filed April 28, 1967]

MOTION TO SUBSTITUTE PARTY DEFENDANT

The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, shows to this Court:

1. That the State of Oklahoma ex rel G. T. Blankenship, Attorney General, filed its Answer and Counter Claim in this cause on February 1, 1967.

2. That it is appropriate to order the substitution of the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, for the State of Oklahoma ex rel G. T. Blankenship, Attorney General.

WHEREFORE, the Defendant, State of Oklahoma, prays that the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, be substituted for the State of Oklahoma ex rel G. T. Blankenship, Attorney General,

as a Defendant in this case, and that the title of this case be amended accordingly.

State of Oklahoma ex rel
Dewey F. Bartlett, Governor

By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma

[Filed, April 28, 1967]

ORDER FOR SUBSTITUTION

The Motion to Substitute Party Defendant filed by the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, by M. Darwin Kirk, Special Counsel, coming on to be heard, and it appearing to the Court that the substitution prayed for should be granted, accordingly,

IT IS ORDERED that the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, be substituted as a party defendant herein for the State of Oklahoma ex rel G. T. Blankenship, Attorney General, and that the title of this case be amended accordingly.

Dated this 28 day of April 1967.

By /s/ Edwin Langley
District Judge

[Filed, September 5, 1967]

MOTION TO CONSOLIDATE CASES AND MOTION FOR JOINT TRIAL OF COMMON QUESTION OF LAW AND FACT

A. Motion to Consolidate

The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, shows to this Court:

1. That Case No. 6219–Civil and Case No. 6166–Civil, both involve only the question of title to the entire bed of the Arkansas River between high water marks from its junction with the Grand River downstream to the Arkansas state line, and both involve the same principal adverse claimants, to-wit: The Cherokee Nation, The Choctaw and Chickasaw Nations, and the State of Oklahoma, together with others claiming under the State of Oklahoma; and,

2. Cases 6219–Civil and 6166–Civil therefore in reality constitute but one case; and

3. The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, is a party defendant in Case No. 6219–Civil, and has moved to intervene as a party defendant in Case No. 6166–Civil;

WHEREFORE, the Defendant, the State of Oklahoma, on the relation of Dewey F. Bartlett, Governor, prays that Cases No. 6219–Civil and No. 6166–Civil be consolidated under the provisions of Rule 42(a) of the Federal Rules of Civil Procedure so that they are thenceforth conducted to judgment as a single cause.

B. Motion For Joint Trial of Common Question of Law and Fact

The State of Oklahoma on the relation of Dewey F. Bartlett, Governor, shows to this Court:

1. That in all captioned cases, to-wit, Cases 5649–Civil, 6143–Civil, 6166–Civil, and 6219–Civil, a common mixed question of law and fact is at issue: the ownership of the bed of the navigable portion of the Arkansas River lying in Oklahoma at the time of Statehood; and,

2. That resolution of the foregoing question, which involves the interpretation of ancient Indian Treaties and surveys, will involve the introduction of numerous documents, many of which are voluminous and expensive to reproduce; and,

3. That a joint trial of this issue, the judgment in which would be binding in all captioned cases, would effect a substantial saving in time, money and effort on behalf of both the Court and the parties litigant;

WHEREFORE, the Defendant, the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, prays that the mixed question of law and fact at issue in all captioned cases, to-wit: the ownership of the bed of the navigable portion of the Arkansas River lying within Oklahoma at the time of Statehood, be decided at a joint trial under the provisions of Rule 42(a) of the Federal Rules of Civil Procedure, the judgment in which shall be binding in all captioned cases.

STATE OF OKLAHOMA on relation of
Dewey F. Bartlett, Governor
By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma

[Filed, September 8, 1967]

MOTION FOR PERMISSION TO INTERVENE

Come now the Choctaw Nation and the Chickasaw Nation and respectfully show to the court that the parties in the above entitled action each claim to be the owners in part or in whole of the bed and banks of the Arkansas River below the mean level of the high river mark upon said banks from a point on the said river in Muskogee County, Oklahoma, thence down the Arkansas River to the eastern boundary of the State of Oklahoma.

These movants claim to be the owner of the fee simple title to all of the above described real property.

These movants claim and the main action have a question of law or fact in common.

Wherefore, pursuant to Rule 24, these movants pray for leave to intervene in this action. There is attached hereto and made a part hereof a pleading setting forth the claim of the Choctaw Nation and the Chickasaw Nation for which intervention is sought.

THE CHOCTAW NATION AND
THE CHICKASAW NATION
By /s/ Lon Kile
Box 726
Hugo, Oklahoma
Their Attorney

[Filed, September 8, 1967]

ORDER

Upon motion it is by the court ordered that the Choctaw Nation and the Chickasaw Nation be and they

are hereby granted permission to intervene herein.

Dated this the 8th day of September, 1967.

By /s/ Edwin Langley
Judge

[Filed, September 8, 1967]

ANSWER AND REPLY OF THE CHOCTAW NATION AND THE CHICKASAW NATION

Come now the Choctaw Nation and the Chickasaw Nation, intervenors herein, and for answer and reply to the other parties to this action, allege and say:

I.

That the jurisdiction of this court is invoked under the applicable provisions of Section 18 of the Act of Congress of April 26, 1906 (34 Stat. 137), as the same has been construed by the Court of Appeals. Choctaw and Chickasaw Nations v. Seitz, 193 P.2d 456.

II.

That the Choctaw and Chickasaw Nations, intervenors above named, were originally domiciled and owned their separate tribal domain East of the Mississippi River; that under a treaty concluded at Doaks Stand on the Natchez Road in the State of Mississippi on October 18, 1820 (7 Stat. 210) all of the lands to which reference is herein made, were ceded by the United States to the Choctaw Nation as its domain west, in exchange for lands then owned by the said Choctaw Nation or Tribe of Indians in the State of Mississippi; that by virtue of the said treaty the Choctaw Nation thereupon became the owner of the tribal domain west, located in what was then the

Indian Territory and what is now a part of the State of Oklahoma; that thereafter and under the provisions of a treaty entered into between the Choctaw and Chickasaw Nations and the United States on the 27th day of January, 1827 (11 Stat. 572), and the consideration therein stipulated to be paid to the Choctaw Nation, the tribal domain originally ceded to the said Choctaw Nation became the jointly owned domain of both the Choctaw and Chickasaw Nations; and that under Departmental allocations the common domain has throughout the years been owned on the basis of three-fourths to the Choctaw Nation and one-fourth to the Chickasaw Nation.

III.

That while individual allotments of land in severalty have, since the enactment by Congress of the Act of July 1, 1902 (32 Stat. 841) ratified as the Supplemental Treaty on September 25, 1902, been made to members of the Choctaw and Chickasaw Tribes of Indians, there has remained many tracts of land not selected as allotments and which are still owned by the Tribes; that said lands are commonly known and referred to as "unallotted lands"; that the lands involved in this action are known as unallotted lands of the Tribes.

The Choctaw Nation is the owner of an undivided three-fourths interest and the Chickasaw Nation is the owner of an undivided one-fourth interest in and to the following described real property situated in Haskell County, Sequoyah County and LeFlore County, Oklahoma, to-wit: the natural bed of the Arkansas River below the high water mark from the confluence of the Arkansas River with the Canadian River thence to the eastern boundary of the State of Oklahoma.

The other parties to this action are claiming some right, title, interest, lien, estate or equity in and to the said real property, the exact nature of which is unknown

to these intervenors, but these intervenors allege that none of the parties herein have any right, title, interest, lien, estate or equity of any kind whatsoever in and to the said real property or any part thereof.

Wherefore, these intervenors pray that the full, legal and equitable title in and to the said real property be quieted and confirmed in them and that the other parties to this action and each of them be required to answer herein and set up the nature and extent of their respective claimed interest in and to the said real property, and that upon the final hearing, such claimed interest be adjudged junior and inferior to the title of these intervenors and that the full, legal and equitable title in and to all of the said real property be quieted and confirmed in these intervenors and against all of the other parties herein, and that each of the other parties herein be forever barred and enjoined from claiming or asserting any right, title, interest, lien, estate or equity in and to the said real property, or any part thereof, adverse or hostile to these intervenors, and for their costs expended herein.

THE CHOCTAW NATION AND
THE CHICKASAW NATION
By /s/ Lon Kile
Box 726
Hugo, Oklahoma
Their Attorney

[Filed, September 25, 1967]

PRE-TRIAL ORDER

On January 13, 1967, a conference was held in these cases at which the legal, factual, and procedural issues and problems the cases have in common were discussed and considered. Subsequently, on January 17, 1967, the court entered a memorandum setting out the principle issues determined at the conference to have been raised

by the pleadings and authorizing the filing of briefs addressed thereto. Counsel for the parties, after reasonably necessary extensions of time therefor, submitted comprehensive and exhaustive briefs, and the cases were then set for further pre-trial and for oral argument on September 8, 1967. They are now before the court for entry of a pre-trial order controlling further proceedings.

The issues common to all of the cases are these:

1. The navigability of the Arkansas River in Oklahoma below its confluence with the Grand River.

2. The ownership of the bed of the Arkansas River below its confluence with the Grand River.

3. The effect of changes in the course of the Arkansas River upon riparian ownerships and upon ownership of the bed.

4. The immunity from suit of the Indian tribes involved, and the right of the State of Oklahoma to waive its sovereign immunity.

5. Jurisdiction of this court.

The cases are consolidated only for the purpose of entering this order resolving these issues, which will be filed as a pre-trial order in each case. Otherwise, the cases will be handled separately.

The claims of the parties which give rise to these issues are briefly stated below. Allegations in the pleadings presenting legal and factual issues not involved in the other cases and not resolved in this order are not included.

CASE NO. 5649–CHOCTAW & CHICKASAW NATIONS v. TIBBETTS, et al.

In this case the Nations seek to quiet title to two tracts of land in this district which they claim were never

allotted to individual members of the tribes pursuant to the Act of Congress of July 1, 1902 (32 Stat. 841), later ratified as a supplemental treaty on September 25, 1902. The land identified in the complaint as Tract 1 and more fully described as the W/2 of Lots 1 and 2 of Section 12, T9N, R25E, was a riparian property lying along the east bank of the Arkansas River as shown in the government survey of 1898. The property identified in the complaint as Tract 2, the full description of which need not be repeated here, is comprised of land which in 1898 was a part of the bed of the Arkansas River but which is now, because of a shift in the course of the river, dry and useable. The Nations demand possession of the tracts and compensation for their use by the defendants since 1946.

The basis upon which the Nations rest their claim to Tract 2, the river bed land, is the treaty concluded at Dancing Rabbit Creek in Mississippi on September 27, 1830 (7 Stat. 333), between the United States and the Choctaw Nation. Under the terms of the treaty the United States in exchange for the Choctaw tribal lands in Mississippi agreed to cede to the Nation as its domain west certain lands now comprising a part of the State of Oklahoma, and pursuant to the stipulation of the treaty the President of the United States issued a patent to the lands on March 23, 1842, following congressional authorization. The lands thus ceded became the jointly owned domain of both the Choctaw Nation and the Chickasaw Nation under the provisions of a treaty between the two tribes and the United States entered into on January 27, 1827 (11 Stat. 572). Both tracts involved in this suit, the Nations claim, were included in the lands ceded under the terms of the treaty for the reason that such lands included the Arkansas River in fee simple, without reservation or limitation.

The State of Oklahoma by Charles Nesbitt, Attorney General, for whom by order of the court there was later

substituted the State of Oklahoma on the relation of Dewey F. Bartlett, Governor, asked and was granted leave to intervene as a defendant. In its answer and cross-complaint the State of Oklahoma denies the plaintiffs' claim to the old river bed, asserting that at the time Oklahoma was admitted to the Union the Arkansas River was navigable and that by reason thereof the State became the owner of the river bed and remains the owner although the river has shifted to another area. The State demands that its title be quieted.

The defendant Robert G. Carter by his answer and cross-complaint denies the ownership claims of the Nations to the two tracts, and alleges ownership in himself. The portion of the former river bed included in Tract 2 and the property comprising Tract 1 have both been added to his property, he claims, which in the hands of his predecessors in title lay along the west bank of the river opposite Tract 1, by accretion through the gradual movement of the river to the east, so that it has completely vacated its former bed and passed almost entirely over Tract 1. He also denies the navigability of the Arkansas River at this juncture and demands strict proof.

The defendant Tom Frank Tibbetts, individually and as Executor of the Estate of Ella M. Tibbetts, deceased, having been substituted by order of the court for the defendant Ella M. Tibbetts, claims that the E/2 of Lots 1 and 2 of Section 12, T9N, R25E, was allotted to Ella M. Tibbetts by the plaintiffs as a member of the Choctaw Nation; that thereafter the river gradually moved to the east, engulfing within the stream the W/2 of Lots 1 and 2 by 1927, with land being added to the land on the west side of the river; that land thus added was in existence in 1936, at which time Ella M. Tibbetts went into possession of both the east and west half of Lots 1 and 2 which had thus been restored; that Ella M. Tibbetts had been claiming and using such land since

1936 and claimed title by prescription; and that he is now the owner as the sole devisee of Ella M. Tibbetts, deceased.

CASE NO. 6143–
STATE OF OKLAHOMA v. SUN OIL CO., et al.

This is a suit by the State of Oklahoma to quiet its title to land which formerly constituted the bed of a section of the Arkansas River in this district and which, it is alleged, was left dry when the river course was diverted by dams and jetties constructed for that purpose by the U. S. Corps of Engineers. It is the State's position, and that of intervening parties claiming interests through the State, that the Arkansas River is a navigable stream, that the State became the owner of the river and its bed upon admission to statehood on November 16, 1907, and that it continued to be the owner of the old bed when the river was diverted to a new course. The defendants, owners of pertinent riparian properties before the change in the river, and persons claiming interests through them, deny the State's claim, asserting ownership in themselves of the river bed. The Choctaw and Chickasaw Nations have intervened by leave of court, claiming ownership of the former river bed on the same grounds alleged in Case No. 5649.

CASE NO. 6166, CHOCTAW &
CHICKASAW NATIONS v. CHEROKEE NATION

The Choctaw and Chickasaw Nations have sued the Cherokee Nation to quiet the title to the bed of the Arkansas River in them throughout its course as the northern boundary of the lands ceded to the Choctaws by the United States in the treaty at Dancing Rabbit Creek in Mississippi on September 27, 1830. Title is asserted to the bed of the river as it existed in 1898 and also as it exists at present where the change from the former bed was by gradual action, together with any

land in between. The basis for the claim is the same as that set out in Case No. 5649: that this stretch of the Arkansas River was included in the lands ceded to the Choctaws, that the river is navigable, and that the bed was not included when the Choctaw lands were allotted to members of the tribe. The case is now pending on the motion of the Cherokee Nation to dismiss for the reason that the suit was not authorized by Congress and the Cherokee Nation is therefore immune from such action.

CASE NO. 6219, CHEROKEE NATION v. STATE OF OKLAHOMA, et al.

The Cherokee Nation in this action lays claim to the Arkansas River in Oklahoma below the mouth of the Grand River and demands an accounting for and the payment of all proceeds received by the State for oil and gas and other leases covering the bed of the Arkansas River below its confluence with the Grand. The tribe claims this portion of the river is navigable, that it acquired title to the river in fee simple by the terms of its treaty with the United States of 1833, that the river has never been allotted to individual members of the tribe, and that the State of Oklahoma does not now and never has owned any part of the river bed and has no interest which it could lease for oil or gas or other purposes. The Nation also demands all future rentals or royalties due under such leases. The State of Oklahoma and the defendants claiming interests through the State deny the plaintiff's claim, asserting title in the State, and in their counter-claim demand that their title and interest be quieted against the Cherokee Nation.

After reviewing the files and reading the excellent briefs prepared by counsel for the parties, and considering the matter thoroughly, including the oral arguments of counsel, the court has reached the conclusions hereinafter set out with respect to the issues here involved.

1. Navigability.

The dominant issue in all of these cases, and upon which the others hinge in the main, is the navigability of the Arkansas River from its confluence with the Grand River in Muskogee County in this district to the eastern boundary of Oklahoma, a question of fact. It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year. Accordingly, it is the decision of this court, based upon judicial knowledge alone and without taking evidence, that this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation, and at the time the treaties were made pursuant to which the lands were ceded, and also at the time Oklahoma was admitted to statehood on November 16, 1907.

2. Ownership of the River Bed.

The parts of the treaties between the United States and the Choctaw Nation and the Cherokee Nation which require construction by the court to determine the validity of their respective claims to the Arkansas River are set out in the pleadings and in the briefs submitted by counsel. After considering these and the arguments of counsel relating thereto, the court has concluded that as

a matter of law regardless of the area properly included within the boundary descriptions of the tribal domains of the Choctaws and the Cherokees in what is now Oklahoma, it was not the purpose or intent of the United States to convey to either tribe ownership of any part of the Arkansas River below its confluence with the Grand River, and that no provision of any treaty with either tribe and no act of Congress or patent issued to the tribes had this effect. This section or part of the Arkansas River became the property of the United States following the Louisiana Purchase in 1803 and remained the property of the United States until Oklahoma was admitted to the union. At that time it became the property of the State of Oklahoma by operation of law, subject to the easement or other right of the United States to do all things required to maintain or restore the river as a navigable stream and to control its use as a highway of commerce.

3. **Effect of River Movement.**

It appears from the pleadings and is assumed by counsel in their briefs that since 1907 there has been considerable shifting in the course of the Arkansas River, generally gradually and imperceptibly but sometimes suddenly, by avulsion. Actually, this is a matter of common knowledge in these parts. It is well established in Oklahoma, and this court holds, that when the change has been gradual the ownership of the bed and the navigation easement of the United States has moved with the river, riparian owners gaining or losing ground depending upon the direction of the movement. The law is also well established that an avulsive change produces no change in riparian ownership. The court is of the view that this principle applies to the ownership of the river bed as well. Where there has been an avulsive change in the river since 1907, therefore, the navigation easement of the United States has followed the new course of the river, the new bed has remained the property of the owner

before the change, and the old bed, wherever it was at the time the change occurred, has remained the property of the owner of the land over which the river flowed, the State of Oklahoma or others, depending on whether there had been earlier avulsive changes.

4. Sovereign Rights.

A question of sovereign rights runs through all of these cases, but no serious dispute appears to exist about them except as to the right of the Choctaw and Chickasaw Nations to maintain their action against the Cherokee Nation. The Choctaw and Chickasaw Nations, the Cherokee Nation, and the State of Oklahoma are all clearly authorized under the law to institute actions of the kind here involved. It is equally clear that the State of Oklahoma is empowered to waive its sovereign immunity from such suits against it and that the Indian tribes are not. These tribes may be made parties defendant in an action only to the extent and for the purpose authorized by Congress, and no such authority exists for any such suit against them. This immunity from suit and lack of authority to waive immunity obtains, in the opinion of the court, where the suit is by one tribe against another as effectively to preclude such suit from being maintained as it does to preclude suit against a tribe by an individual or by the State. Where an Indian nation intervenes in a suit to assert a claim, however, as the Choctaw and Chickasaw Nations have done in Case No. 6143, State v. Sun, it is in the case for all purposes. But under this ruling the order allowing the State to intervene against the tribes in Case No. 5649 was improvidently entered.

5. Jurisdiction.

Except to the extent that sovereign immunity precludes maintaining suit, the court is satisfied that it has

jurisdiction over the subject matter and the parties in these actions. With all rights asserted by the plaintiffs in the suits resting on the navigable character of the Arkansas River, long held to be a federal question, and with all property involved in the controversies within this district, this is the proper court for resolution of the differences giving rise to the suits.

In accordance herewith, orders should be entered for the disposition or further proceedings in each of the cases as follows:

The motion to dismiss in Case No. 6166, Choctaw and Chickasaw Nations v. Cherokee Nation, should be granted and the action dismissed. In Case No. 6219, Cherokee Nation v. State, judgment in favor of the defendants and against the plaintiff should be entered upon the pleadings. The remaining cases, No. 5649, Choctaw and Chickasaw Nations v. Tibbetts, and No. 6143, State v. Sun, should be set separately for further pre-trial and other hearings that may be necessary in preparation for trial to determine the nature and extent of the river movement alleged in the pleadings and the effect thereof on the ownership interests of the parties, together with other pertinent issues not herein resolved.

In the opinion of the court the conclusions herein, and the orders to be entered pursuant thereto, involve controlling questions of law as to which there is substantial ground for difference of opinion, and an appeal therefrom may in each case materially advance the ultimate termination of the litigation. For that reason, further proceedings in these cases will be stayed pending resolution of the issues on appeal from this order, if allowed and taken.

/s/ Edwin Langley
District Judge

[Filed, October 4, 1967]

MOTION TO CORRECT PRE-TRIAL ORDER

Come now the Choctaw Nation and the Chickasaw Nation and respectfully show to the court that they have heretofore moved the court for leave to intervene in this case. At the pretrial conference on September 8, 1967, the court granted the motion and allowed the Choctaw Nation and the Chickasaw Nation to intervene.

The order of the court filed September 25, 1967 reflecting the proceedings had at that conference did not show that the Choctaw Nation and the Chickasaw Nation were allowed to intervene and to file the answer which was attached to their motion to intervene.

Wherefore, the Choctaw Nation and the Chickasaw Nation respectfully pray the court to correct its order of September 25, 1967, reflecting the proceedings had in said pretrial by showing that the Choctaw Nation and Chickasaw Nation were granted permission to intervene and file the answer which was attached to their motion to intervene.

/s/ Lone Kile
Box 726
Hugo, Oklahoma

Attorney for the
Choctaw Nation and
the Chickasaw
Nation

[Filed, October 10, 1967]

AMENDMENT TO PRE-TRIAL ORDER

The pre-trial order entered herein on September 25, 1967, to the extent applicable to this case is amended as follows:

The Choctaw and Chickasaw Nations have by leave of court filed a petition in intervention alleging ownership in the Arkansas River bed below the high water mark from the confluence of the Arkansas River with the Canadian River to the eastern boundary of the State of Oklahoma adversely to the claim of the Cherokee Nation to this portion of the river and adversely to the claims of the defendants.

For the reasons set out in the pre-trial order, the court is of the opinion that the claim of these tribes to this portion of the Arkansas River bed is without merit and that judgment in favor of the defendants and against the intervenors should be entered upon the pleadings.

/s/ Edwin Langley
District Judge

THIRTY-THIRD DAY, SEPTEMBER TERM, WEDNESDAY, OCTOBER 25th, 1967.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

* * *

THIRTY-THIRD DAY, SEPTEMBER TERM, WEDNESDAY, OCTOBER 25th, 1967.

These causes came on to be heard on application for an interlocutory appeal from the United States District Court for the Eastern District of Oklahoma in the above entitled matters.

On consideration whereof, it is now here ordered by this court that the said application for interlocutory appeal be and the same is hereby denied.

[Filed, November 15, 1967]

JUDGMENT

In accordance with the pre-trial order entered herein on September 25, 1967, and the amendment thereto entered October 10, 1967, and for the reasons therein stated, the court is of the opinion, and so finds, that no grounds exist upon which there can be granted the relief prayed for by the plaintiff, The Cherokee Nation, or by the intervenors, the Choctaw and Chickasaw Nations, and that judgment should be entered against said Indian tribes and in favor of the defendants upon their counter-claims.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that upon being admitted to the union of states on November 16, 1907, the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma, in the Eastern District of Oklahoma, said river being a navigable stream throughout this portion of its course, subject only to the right of the United States to maintain or restore the navigability of the river and to control its use as a highway of commerce between states; that against the Cherokee Nation and the Choctaw and Chickasaw Nations, now claiming ownership thereof as unalloted lands of their western domains, the title of the State of Oklahoma, and of all defendants herein claiming an interest through the State, is quieted and said tribes are barred and enjoined from asserting ownership or other claims adverse to said defendants; and that said Indian tribes have no right or interest in any money or other proceeds realized or which may be realized by the State of Oklahoma or the other defendants from the lease or rental or other use of said lands.

IT IS FURTHER ORDERED that each of the parties herein shall bear its own costs.

/s/ Edwin Langley
District Judge

[Filed, November 24, 1967]

MOTION FOR NEW TRIAL AND IN THE ALTERNATIVE MOTION TO OPEN THE JUDGMENT TO TAKE ADDITIONAL EVIDENCE

The Plaintiff moves that the judgment entered herein on the 15th day of November, 1967 be vacated and set aside and that a new trial be granted on the following grounds:

(1) That the Court was in error in concluding that upon being admitted to the Union of States on November 16, 1907 the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma.

(2) That the Court was in error in the pretrial order of September 25, 1967 with respect to conclusion therein expressed concerning ownership of the bed of the Arkansas River.

(3) The Court erred in entering judgment for the defendants.

In the alternative the Plaintiff would show to the Court that in determining the title question involved herein and the intent and purpose of the parties to the Treaties between the United States and the Cherokee Nation which the Court declared to be the basis of

conclusion in the aforesaid pretrial order, there are a number of Government documents and State papers which were not included in or attached to briefs heretofore submitted by Plaintiff which Plaintiff believes essential to determination of such intent.

That failure to so attach these proposed exhibits was occasioned by Plaintiffs belief that at some time during proceeding and before judgment Plaintiffs would be afforded an opportunity to offer them into evidence. Plaintiffs did not, by brief heretofore submitted, attempt to, nor did it understand that it was required to include all such evidence.

WHEREFORE, Plaintiff prays that a new trial be granted and that in the alternative and in the circumstances and in view of the importance of the problem involved the Court will open the judgment and permit all parties to submit additional documentary evidence into the record.

THE CHEROKEE NATION, PLAINTIFF

By /s/ Earl Boyd Pierce
Andrew Wilcoxen
Joe Muskrat
Attorneys for Plaintiff

[Filed, November 27, 1967]

MOTION FOR NEW TRIAL AND IN THE ALTERNATIVE MOTION TO OPEN THE JUDGMENT TO TAKE ADDITIONAL EVIDENCE

The intervening defendants, Choctaw Nation and Chickasaw Nation move that the judgment entered herein on the 15th day of November, 1967 be vacated and set aside and that a new trial be granted on the following grounds:

(1) That the Court was in error in concluding that upon being admitted to the Union of States on November 16, 1907 the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma.

(2) That the Court was in error in the pre-trial order of September 25, 1967 with respect to conclusions therein expressed concerning ownership of the bed of the Arkansas River.

(3) The Court erred in entering judgment for the defendants.

In the alternative the Intervening Defendants would show to the Court that in determining the title question involved herein and the intent and purpose of the parties to the treaties between the United States and the Indian nations which the Court declared to be the basis of conclusion in the aforesaid pre-trial order, there are a number of government documents and state papers which were not included in or attached to briefs heretofore submitted which are essential to determination of such intent.

That failure to so attach these proposed exhibits was occasioned by Intervening Defendants belief that at some time during proceedings and before judgment they would be afforded an opportunity to offer them into evidence. Defendants did not, by brief heretofore submitted attempt to, nor did they understand that it was required to include all such evidence.

Wherefore, Intervening Defendants pray that a new trial be granted and that in the alternative and in the circumstances and in view of the importance of the problem involved the Court will open the judgment and

permit all parties to submit additional documentary evidence into the record.

THE CHOCTAW NATION and
CHICKASAW NATION
Intervening Defendants

By /s/ Lone Kile
Hugo, Oklahoma
Attorney for Intervening
Defendants.

[Filed, December 4, 1967]

RESPONSE TO MOTION FOR NEW TRIAL AND MOTION TO OPEN JUDGMENT OF CHEROKEE NATION

Come now the defendants, State of Oklahoma, Commissioners of the Land Office of the State of Oklahoma, Eason Oil Company, Steve Gose, Humble Oil & Refining Company, Lone Star Producing Company, Marathon Oil Company, Mobil Oil Corporation, Skelly Oil Company, Southland Royalty Company, Tenneco Oil Company, and Union Oil Company of California, and respond to the Motion for New Trial and Motion to Open Judgment filed on behalf of the plaintiff, Cherokee Nation, as follows:

1. The judgment entered on November 15, 1967, which was in accordance with the pre-trial order entered in this cause on September 25, as amended by order entered October 10, 1967, was correct in all respects.

2. The judgment is not based upon evidence introduced by the parties, but solely upon the interpretation of treaties between the Cherokee Nation and the United States and between the Choctaw and Chickasaw Nations and the United States, the patents from the United States to each Nation, and matters concerning which the

court was entitled to take judicial notice. No other documents were then, or are now, necessary to support the judgment.

WHEREFORE, the above-named defendants request that the motion be denied.

FOR THE DEFENDANTS:
Eason Oil Company
Steve Gose
Humble Oil & Refining Company
Lone Star Producing Company
Marathon Oil Company
Mobil Oil Corporation
Skelly Oil Company
Southland Royalty Company
Tenneco Oil Company
Union Oil Company of California
Commissioners of the Land Office of the State of Oklahoma, and
State of Oklahoma ex rel Dewey F. Bartlett, Governor

By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma 74101

[Filed, December 4, 1967]

RESPONSE TO MOTION FOR NEW TRIAL AND MOTION TO OPEN JUDGMENT OF CHOCTAW AND CHICKASAW NATIONS

Come now the defendants, State of Oklahoma, Commissioners of the Land Office of the State of Oklahoma, Eason Oil Company, Steven Gose, Humble Oil & Refining Company, Lone Star Producing Company, Marathon

Oil Company, Mobil Oil Corporation, Skelly Oil Company, Southland Royalty Company, Tenneco Oil Company, and Union Oil Company of California, and respond to the Motion for New Trial and Motion to Open Judgment filed on behalf of the intervening plaintiff, Choctaw and Chickasaw Nations, erroneously referred to in their motion as intervening defendants, as follows:

1. The judgment entered on November 15, 1967, which was in accordance with the pre-trial order entered in this cause on September 25, as amended by order entered October 10, 1967, was correct in all respects.

2. The judgment is not based upon evidence introduced by the parties, but solely upon the interpretation of treaties between the Cherokee Nation and the United States and between the Choctaw and Chickasaw Nations and the United States, the patents from the United States to each Nation, and matters concerning which the court was entitled to take judicial notice. No other documents were then, or are now, necessary to support the judgment.

WHEREFORE, the above-named defendants request that the motion be denied.

FOR THE DEFENDANTS:
Eason Oil Company
Steve Gose
Humble Oil & Refining Company
Lone Star Producing Company
Marathon Oil Company
Mobil Oil Corporation
Skelly Oil Company
Southland Royalty Company
Tenneco Oil Company
Union Oil Company of California
Commissioners of the Land Office

of the State of Oklahoma, and
State of Oklahoma ex rel Dewey F.
Bartlett, Governor

By /s/ M. Darwin Kirk
Special Counsel
P. O. Box 1439
Tulsa, Oklahoma 74101

[Filed, December 29, 1967]

ORDER

This cause is before the court on the motion of the plaintiff, the Cherokee Nation, and the motion of the intervening defendants, the Choctaw and Chickasaw Nations, for a new trial or in the alternative to open the judgment to take additional evidence, and on the response thereto filed by the other defendants. After considering the matter fully, the court is of the opinion, and so finds, that the motions should be denied.

The pre-trial order entered on September 25, 1967, as amended by the order of October 10, 1967, and the judgment pursuant thereto filed November 15, 1967, are not based on evidence. The adjudication is simply that the treaties involved, viewed in the light of relevant court decisions, provide no basis for the movants' claims. The court has studied the treaties and pertinent decisions thoroughly in reaching its conclusions with respect to the rights of the Indian tribes and is satisfied that the taking of evidence is neither necessary nor appropriate, and that no useful purpose would be served in prolonging consideration of the questions involved at this level.

IT IS THEREFORE ORDERED that the motions be overruled and denied.

/s/ Edwin Langley
District Judge

[Filed, January 24, 1968]

NOTICE OF APPEAL

Notice is hereby given that the Choctaw Nation and the Chickasaw Nation, intervenors in the above styled and numbered action, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the order of the United States District Court for the Eastern District of Oklahoma entered on the 15th day of November, 1967, and the order by the United States District Court for the Eastern District of Oklahoma entered on the 29th day of December, 1967, overruling the motion of the Choctaw Nation and the Chickasaw Nation for a new trial or in the alternative to open the judgment to take additional evidence.

/s/ Lon Kile
Post Office Box 726
Hugo, Oklahoma
Attorney for the Intervenors
the Choctaw Nation and the
Chickasaw Nation

[Filed, January 29, 1968]

BOND FOR COSTS ON APPEAL

We the undersigned jointly and severally acknowledge that we are bound to pay the State of Oklahoma the sum of $250.00.

The condition of this bond is that whereas the intervenors the Choctaw Nation and the Chickasaw Nation have appealed to the United States Court of Appeals for the Tenth Circuit by notice of appeal filed on the 23rd day of January, 1968, from the judgment of this court

entered on the 15th day of November, 1967, and the order by the United States District Court for the Eastern District of Oklahoma entered on the 29th day of December, 1967, overruling the motion of the Choctaw Nation and the Chickasaw Nation for a new trial or in the alternative to open the judgment to take additional evidence, and if the intervenors the Choctaw Nation and the Chickasaw Nation shall pay all costs adjudged against them if the appeal is dismissed and the judgment affirmed or such cost as the appellate court may award if the judgment is modified, then this bond is to be void, but if the intervenors fail to perform this condition, payment of the amount of this bond shall be due forthwith.

THE CHOCTAW NATION

By /s/ Harry J. W. Belvin
Chief

THE CHICKASAW NATION

By /s/ Overton James
Governor

By /s/ Florene Kiles
Surety

I, Florene Kile, the undersigned surety on the above bond, upon my oath state that I am a resident householder and freeholder within the State of Oklahoma and have property within said State over and above my just debts and liabilities, exclusive of property exempt from execution, exceeding the value of $500.00.

/s/ Florene Kile

[Filed, January 25, 1968]

NOTICE OF APPEAL

Notice is hereby given that the Cherokee Nation or Tribe of Indians in Oklahoma, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the pre-trial order heretofore entered by this Court on the 25th day of September, 1967 and the judgment dated November 15, 1967, and the order of the Court denying and overruling the motion for new trial or in the alternative to open the judgment entered on December 29, 1967.

THE CHEROKEE NATION OR
TRIBE OF INDIANS IN OKLAHOMA, PLAINTIFF,
By /s/ Earl Boyd Pierce
Andrew Wilcoxen
Joe Muskrat
Attorneys for Plaintiff

[Filed, January 30, 1968]

THE CHEROKEE NATION

General Counsel

January 29, 1968

Honorable John B. Fink, Clerk
United States District Court
Muskogee, Oklahoma 74402

Re: 6219-Civil, The Cherokee Nation or Tribe of Indians in Oklahoma vs. The State of Oklahoma, et al.

BOND FOR COSTS

The undersigned, Earl Boyd Pierce of Muskogee, Oklahoma, hereby certifies that he is the General Counsel of

the Cherokee Nation or Tribe of Indians in Oklahoma, and is one of the Attorneys for Plaintiff in the above styled and numbered suit; that heretofore he has been duly authorized by the Principal Chief and Executive Committee of the Cherokee Nation to incur any reasonable and necessary expense in the prosecution of said suit to final conclusion; that a Cost Bond in the amount of $250 is required to be posted under the Federal Rules of Civil Procedure in the event of an Appeal, notice of which in the above case has already been filed, and said Attorney hereby certifies that all costs of said appeal which may hereafter be assessed against the said Cherokee Nation will upon demand be forthwith paid to the Office of the Clerk of this Court.

Witness my hand as such Attorney for the said Cherokee Nation or Tribe of Indians in Oklahoma and as General Counsel for said Nation on this 29th day of January, 1968.

/s/ Earl Boyd Pierce
General Counsel for the
Cherokee Nation and one
of the attorneys in the
above styled and numbered
cause.

cc: Honorable W. W. Keeler, Principal Chief
Mr. Ralph Keen, General Business Manager
Mr. Andrew Wilcoxen
Mr. Joe Muskrat
Mr. Jesse L. Ballard

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis, Circuit Judge.

The Cherokee Nation or Tribe of Indians in Oklahoma et al.,	)	
Appellants,	)	
9924-9925 vs.	)	Appeals from the United States District Court for the Eastern District of Oklahoma.
State of Oklahoma et al.,	)	
Appellees.	)	

ORDER

On consideration of appellees' motion to affirm, it is ordered that the said motion be and the same is hereby denied.

OPINION
OF THE UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Earl Boyd Pierce for appellant The Cherokee Nation. With him on the brief were Joseph Muskrat, Andrew C. Wilcoxen and Jesse L. Ballard.

Lon Kile for Appellants The Choctaw Nation and The Chickasaw Nation.

M. Darwin Kirk for the Appellees. With him on the brief were:

G.T. Blankenship, Attorney General, for the State of Oklahoma;

N.A. Gibson for Commissioners of the Land Office of the State of Oklahoma;

Jay R. Bond and Ross, Holtzendorff & Bond for Eason Oil Company;

Varley H. Taylor for Humble Oil & Refining Co.;

Robert W. Richards and S.M. Groom, Jr., for Mobil Oil Corporation;

Judson S. Woodruff, McAfee, Dudley, Taft, Cates & Mark and S.W. Wells for Skelly Oil Company;

H.B. Watson, Jr., and Walker & Watson for Union Oil Company of California and Steve Gose;

Frederick Dorwart and Holliman, Langholz & Runnels for Lone Star Producing Co.;

David O. Crodell, Eugene A. Hoefling, Riley B. Fell and Oscar L. Hasty for Marathon Oil Company;

Glenn R. Davis, Boesche, McDermott & Eskridge and Millard F. Carr for Tenneco Oil Company;

Dale Hinson, Robert L. Trimble and Hudson, Keltner, Smith & Cunningham for Southland Royalty Company;

W. Douglas Weisbruch for Lone Star Producing Co.

Roger P. Marquis for Amicus Curiae the United States. With him on the brief were Clyde O. Martz, Assistant Attorney General, and Frank B. Friedman, Attorney, Department of Justice.

Alpheus Varner for Amici Curiae Robert G. Carter, B.E. Cobb and Katherine Cobb Baker.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges. BREITENSTEIN, Circuit Judge.

This controversy concerns the ownership of the bed of the Arkansas River between its confluence with the Grand River[1] and the Oklahoma-Arkansas boundary. The Cherokees, Choctaws, and Chicakasaws claim under deeds for vast areas executed by the United States. Oklahoma says that under the equal footing-implied trust doctrine it received title to the beds of navigable streams upon its admission to the Union. The trial court's decision in favor of Oklahoma was made, without an evidentiary hearing, on the pleadings and matters of which it could take judicial notice. No party contends seriously that any evidence is needed or helpful.

The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injuction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed.[2]

All parties agree that the stretch of the Arkansas River with which we are concerned is navigable in fact.[3] From the mouth of the Grand to the confluence with the Canadian, the Arkansas flows through an area granted to the Cherokees. From the mouth of the Canadian to the

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[1] Sometimes known as the Neosho River and as the Neosho-Grand River.

[2] This is a joint claim. It is undisputed that the Choctaws have an undivided three-fourths interest and the Chickasaws an undivided one-fourth interest. See 11 Stat. 573; 11 Stat. 611; and Chickasaw Nation v. United States, 94 Ct. Cl. 215, 237. Hereinafter reference will be made only to the Choctaws.

[3] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86, the Supreme Court upheld a lower court finding that the head of navigation on the Arkansas was the mouth of the Grand.

state boundary, the river divides the lands of the Cherokees, which lie to the north, from the lands of the Choctaws, which lie to the south. The Choctaws claim that their title goes to the north bank of the Arkansas and the Cherokees dispute this. We find it unnecessary to consider this controversy between the Tribes.

The Tribes assert ownership by reason of deeds from the United States covering vast, undivided areas, the perimeters of which were described by metes and bounds. The deeds did not except the beds of navigable streams. The basic argument is that, as a simple matter of conveyancing law, title to all lands within the area vested in the Tribes. An understanding of the situation requires consideration of the circumstances in which the deeds were issued.

At the time of the independence of the United States, the Tribes occupied large areas of land in the South. Westward expansion caused increasing friction between the white settlers and the Indians. Georgia and other later formed states asserted jurisdiction over the Indians and their lands. Intolerable situations arose.[4] The states ignored efforts by the United States to protect and provide for the Indians through treaty and statute. The federal government, faced with growing strife among the Indians and the states, adopted the policy of resettling the Indians on lands to the west which were not then settled by whites.

The Cherokees were first given lands near the White River in what is now the State of Arkansas.[5] Emigration

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[4] Descriptions of the condition of the Indians are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; and Choctaw Nation v. United States, 119 U.S. 1.

[5] See Treaty of July 8, 1817, 7 Stat. 156, 158.

was slow, and new treaties were made, providing for resettlement of all the Cherokees on land west of the Mississippi to be deeded to the Indians by the United States. In turn, the Indians surrendered their lands east of the Mississippi.[6] The Cherokees were then moved to the new lands, but the voluntariness of their migration, and of their consent to the treaties, is doubtful.

The story of the Choctaws is much the same. Relocation of that Tribe from areas east of the Mississippi was made pursuant to the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, and the Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333. The Choctaws gave up their lands in the East and received lands in the West.

The relocation of the Indians was made possible by the Louisiana Purchase of 1803,[7] in which the United States obtained the major portion of the western basin of the Mississippi River with the express intent that the inhabitants of the region "shall be incorporated in the Union of the United States."[8] Prior to relocation, however, the Cherokees and Choctaws desired protection from harrassment by state and territorial governments. To induce them to move across the Mississippi, the United States agreed in the Treaty of New Echota and in the Treaty of Dancing Rabbit Creek that no part of the land granted would be included in any state or terri-

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[6] See Treaty of May 6, 1828, 7 Stat. 311; Treaty of February 14, 1833, 7 Stat. 414; and Treaty of New Echota, December 29, 1835, 7 Stat. 478.

[7] Treaty of April 30, 1803, 8 Stat. 200.

[8] Id. at 202.

tory.[9] The patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries.

In the years that followed the situation of the Indians deteriorated.[10] New territories were created in the West and new states admitted into the Union. A number of these states were in regions where Indian treaties provided that no state or territory should be created.[11] The existence of an extensive area which was held by the Indians and in which private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.[12] In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13] and the allotment of land to the individual members of the tribes. The result was an agreement with

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[9] The Treaty of New Echota provided (Art. 5, 7 Stat. 478, 481) that the lands ceded "shall, in no future time without their [the Indians'] consent, be included within the territorial limits or jurisdiction of any State or Territory." The Treaty of Dancing Rabbit Creek provided (Art. IV, 7 Stat. 333, 334) that "no part of the land granted them [the Indians] shall ever be embraced in any Territory or State."

[10] Stephens v. Cherokee Nation, 174 U.S. 445, 450-460, contains an account of conditions existing in the tribal governments and mentions their corruption and irresponsibility.

[11] See e.g. Treaty with the Senecas and Shawnees of July 20, 1831, 7 Stat. 351, 353; Treaty with the Shawnee of August 8, 1831, 7 Stat. 355, 357; and Treaty with the Ottaway of August 30, 1831, 7 Stat. 359, 361.

[12] Choate v. Trapp, 224 U.S. 665, 667.

[13] 27 Stat. 612, 645.

the Cherokees[14] and with the Chocktaws[15] which nullified treaties inconsistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. 137, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians.[17]

Oklahoma was admitted into the Union in 1907 upon compliance with the conditions of the Enabling Act[18] which provided that Oklahoma should be so admitted "on an equal footing with the orignal States,"[19] and on the agreement that it disclaim title "to all lands * * * owned or held by any Indian or Indian Tribes."[20] By statute[21] and by court decision[22] Oklahoma has consistently maintained the position that it owns the beds

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[14] 32 Stat. 716, 727.

[15] 32 Stat. 641, 656.

[16] These included the Chickasaws, Creeks, and Seminoles in addition to the Cherokees and the Choctaws.

[17] 34 Stat. at 148.

[18] Act of June 16, 1906, 34 Stat. 267.

[19] Id. at 271.

[20] Id. at 279.

[21] See 64 Okl.St.Ann. § 290; 60 Okl.St.Ann. § 337.

[22] State v. Nolegs, 40 Okl. 479, 139 Pac. 943; Vickery v. Yahola Sand & Gravel Co., 158 Okl. 120, 12 P.2d 881; City of Tulsa v. Commissioners of Land Office, 187 Okl. 82, 101 P.2d 246; and Lynch v. Clements, (Okl.) 263 P.2d 153.

underlying navigable streams. The present suit which questions that ownership was brought by the Cherokees nearly sixty years after statehood.

In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to the beds underlying navigable waters passes to the new states.[23] Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such dispositions except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The parties recognize the principles just stated except that the Indians and those who support them question the applicability of the Holt State Bank decision because of distinguishing facts. Before Minnesota became a state in 1858, the Chippewas ceded to the United States their aboriginal right of occupancy with the reservation of an area for continued occupation. Included therein was Mud

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[23] See Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, and Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65.

Lake which the Court found to be navigable water. Later the Indians relinquished the area to the United States. The issue was whether the United States held title to the land on which Mud Lake was located. The Court held that the lands under the lake were not disposed of by the United States before Minnesota became a state and title passed to Minnesota on admission. Although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at bar each relate to the question of whether the United States had disposed of lands underlying navigable waters before statehood. We must follow the admonition in Holt State Bank that such dispositions should not be regarded as intended in the absence of a clear showing of intent.

The United States, as amicus,[24] argues that the equal footing-implied trust doctrine has no application because of the unique character of the Cherokee and Choctaw territory under the treaties and cites Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, as supporting authority. In that case the issue was the validity of an act forfeiting a part of a railroad land grant. A claim of the railroad was that the forfeiture failed because the United States had not carried out its part of the bargain to extinguish certain Indian titles. The Court mentioned the Treaties of New Echota and Dancing Rabbit Creek and said that the extinguishment of the Indian title was for determination by Congress or by the executive officers of the federal government, or by voluntary acts of the Indians. Id. at 437-438. The Court quoted with approval the statement in Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, that the Cherokee territory "is not a

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[24] The United States disclaims any pecuniary interest in the outcome of the cases and says that it submits its views because of "its nonpecuniary obligations to represent certain Indian interests."

foreign, but a domestic territory—a Territory which originated under our Constitution and laws."

The treaties with the Indians are not in the same category with treaties with independent foreign nations. The Supreme Court early held that English possessions in America were claimed by right of discovery rather than by right of conquest and that under international law the Indians were regarded as temporary occupiers of the soil which was disposable by the Crown.[25] The title of the Crown passed to the United States and the Indian lands were subject to disposition under the Constitution and laws of the United States. The agreements with the Indians, when ratified by Congress, became statutes of the United States. When grants were made to the Indians, the area granted remained under the jurisdiction of the United States and subject to its Constitution and laws.

In spite of provisions in Indian agreements that no state or territory would be created in certain areas,[26] states were created in the Northwest Territory and in the area covered by the Louisiana Purchase. In the situations before us, the Cherokees and Choctaws agreed to a nullification of the Treaties of New Echota and Dancing Rabbit Creek.[27] Oklahoma was admitted to the Union on an equal footing with the original states. From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state.

Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of

[25] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595, and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409.

[26] See footnote 11.

[27] See footnotes 14 and 15.

the federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent "very plain."[28]

The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

The Indians point out that the ownership of the riverbed is not necessary to the exercise of control over nagivation incidental to the authority of the Government under the Commerce Clause. This proves nothing. We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional powers of the United States,[29] if it has any effect at all, negatives intent to convey the riverbed.

Pursuant to their agreements with the United States, the Indians surrendered the areas which they occupied in the South. They reason that because they gave up the beds of navigable rivers, the United States intended that

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[28] United States v. Holt State Bank, 270 U.S. 49, 55.

[29] See Treaty of New Echota, Art. 5, 7 Stat. 478, 481, and Treaty of Dancing Rabbit Creek, Art. IV, 7 Stat. 333, 334.

they should have such riverbeds in the areas to which they were removed; and conversely they say that if they do not own the Oklahoma riverbeds, they still own the beds of the navigable rivers in the territory from which they were removed. The reasoning is unpersuasive. The Indians had an aboriginal title which was subject to the Constitution and laws of the United States. Failure to mention riverbeds does not establish an intent either to retain or relinquish title. If anything,it shows that no party had the problem in mind.

Amici Carter, et al., argue that no contemporary intent of Congress to reserve the riverbeds can be postulated because under the then existing law the concept of navigability was limited to waters affected by the rise and fall of the tides and the Arkansas was not so affected. The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides.[30] The recognition in 1832 by Kent of the English rule[31] preceded any decision by the Supreme Court on the issue and may not be taken as authoritative or persuasive. Reliance on the January 19, 1816, act of the Missouri Territorial Legislature[32] is misplaced because it adopted the common law of England except to the extent that it was not of a "local nature" and "not repugnant to, nor inconsistent with the constitution and laws of the United States." The Supreme Court has said that the ebb and flow of the tide test is not applicable to conditions in the United

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[30] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, and Barney v. Keokuk, 94 U.S. 324, 336. The reason is that in England all navigable rivers are affected by the tide whereas in the United States that condition is not present.

[31] See Commentaries on American Law by James Kent, 2d ed., Vol. III, p. 427.

[32] The pertinent area was then in the Territory of Missouri.

States. Jones v. Soulard, 65 U.S. (24 How.) 41, deals with the ownership of accretions and is not in point.

The application of the navigability principle announced in The Daniel Ball and in Barney v. Keokuk, supra, to the situation presented does not violate any rule of stare decisis. We recognize the importance of stare decisis to decisions affecting property rights.[33] There is no showing that any federal court has ever applied the tidewater rule in determining the ownership of land underlying navigable water and, particularly, there is no factual basis for any claim that the Cherokees or Choctaws ever relied on that rule to their detriment.[34]

United States v. Rands, 389 U.S. 121, is no help to the Indians. That decision recognized the dominant navigational servitude held by the United States and rejected the claim that the United States must pay compensation for land's special value as a port site. It was not concerned with the ownership of a riverbed. It does not overrule Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, which says that the soils underlying navigable water "were not granted by the Constitution to the

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[33] In this regard the amici Carter, et al., rely heavily on the statement in The Propeller Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458, that in overruling The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, it was not concerned with property rights. These cases dealt with admiralty jurisdiction and have no pertinence here.

[34] In Shively v. Bowlby, supra the Court applied the American rule in deciding the ownership of the Columbia River upon Oregon's entrance to the Union in 1859. In the Holt State Bank case, supra, the Court applied the same rule to the ownership of Mud Lake when Minnesota became a state in 1858.

United States, but were reserved to the several States."[35] We find nothing in the law as it was at the times of the treaties which can be taken as indicative of an intent by the United States to pass title to the riverbed of the Arkansas to the Indians.

The Indians seek comfort from the technical language of the treaties and grants. They attach significance to such phrases as "to the Arkansas River," "down the Arkansas," and "thence down the main channel of the Arkansas." We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments, or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed. Reliance on the surveys is misplaced. The surveyors could not determine the intent of the United States. Donnelly v. United States, 228 U.S. 243, is not in point. Prior to the creation of the reservation there in question, California, by an act of its legislature, had excluded the Klamath River from the navigable class and the Court said that accordingly the river was not navigable in law. Id. at 262-263.

In Moore v. United States, 9 Cir., 157 F.2d 760, cert. denied 330 U.S. 827, and in United States v. Stotts, W.D. Wash., 49 F.2d 619, it was held that lands above low-water mark in tidal areas passed to Indians under treaties with the United States. In each case the court found a definite intent on the part of the United States to retain those lands and waters for the benefit of Indian fisheries and distinguished Holt State Bank, supra, on this ground. In the case before us we have no showing of any need by the Indians for the riverbed of the Arkansas

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[35] In United States v. Holt State Bank, 270 U.S. 49, 55, the Court said that "the United States early adopted and constantly has adhered to" the implied trust doctrine regarding lands under navigable waters.

and no expression of intent that it should pass to the Indians.

We recognize that an Indian treaty is to be liberally construed in favor of the Indians[36] as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection.[37] Another rule of construction is that in a grant by the sovereign nothing passes by implication.[38] Holt State Bank extends this rule to a situation relating to Indian lands and to the equal footing-implied trust doctrine. Although Holt State Bank did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission. Such an intent is not shown by the grant of millions of acres of land which are described by perimeters. The responsibility of the United States to the new states is not less than its responsibility to the Indians.

In the final analysis the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey

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[36] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116.

[37] Menominee Tribe of Indians v. United States, 391 U.S. 404, 406. The Treaty of Dancing Rabbit Creek provides, Art. XVIII, 7 Stat. 333, 336, that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

[38] Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534, and Caldwell v. United States, 250 U.S. 14, 20.

away property held for the benefit of the new states. When Congress passed the statutes pursuant to the Treaties of New Echota and Dancing Rabbit Creek, the lands covered were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.

In the view of the disposition which we make of the case it is unnecessary to consider the jurisdiction of the court over the claim of the Choctaws against the Cherokees or the validity of that claim.

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

Upon consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court be and the same is hereby affirmed.

MOTION TO RECALL MANDATE

The appellant, The Cherokee Nation or Tribe of Indians in Oklahoma, respectfully moves this Honorable Court to recall the Mandate in the above entitled action until further order of the Court on the ground and for the reason that the appellant expects and intends in good faith within the time allowed by law to apply to the Supreme Court of the United States of America a peti-

tion for review on a writ of certiorari of the decision and judgment rendered in favor of Appellees and against Appellant in the above entitled action.

WHEREFORE, Appellant prays that the Court make and enter an appropriate order herein, recalling and staying the Mandate in this action until further Order of the Court.

THE CHEROKEE NATION or Tribe of Indians in Oklahoma,

By: ANDREW WILCOXEN,
P.O. Box 1842
Muskogee, Oklahoma 74401,

Attorney for Appellant.

On application of appellant, it is ordered that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under the rules of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

CLERK'S CERTIFICATE

I, William L. Whittaker, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing to be a full, true, and complete copy of certain pleadings, record entries and proceedings

including the record on appeal, review or enforcement from the trial court or administrative agency had and filed in the United States Court of Appeals for the Tenth Circuit in the cause described on page 1 hereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this twenty-third day of January 1969.

William L. Whittaker

By /s/ Ruth H. Jacobson, d.c.
William L. Whittaker, Clerk
of the United States Court
of Appeals for the Tenth
Circuit.

Supreme Court of the United States

No. 976 ---- , *October Term, 19* 68

The Choctaw Nation and The Chickasaw Nation,

Petitioners,

v.

Oklahoma, et al.

ORDER ALLOWING CERTIORARI. Filed April 21 ---------- , 19 69

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth ---------- Circuit is granted. The case is consolidated with No. 1104 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 1104 ----- , *October Term, 19* 68

The Cherokee Nation or Tribe of Indians
in Oklahoma,

Petitioner,

v.

Oklahoma, et al.

ORDER ALLOWING CERTIORARI. Filed April 21 ---------- , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth ---------- Circuit is granted. The case is consolidated with No. 976 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

JAN 25 1969

JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

No. ~~975~~ 41

THE CHEROKEE NATION OF TRIBE OF INDIANS OF OKLAHOMA,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents,

THE CHOCTAW NATION and the CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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State v. Nolegs, 40 Okla. 479, 139 Pac. 943; Vickery v. Yahola Sand and Gravel, 158 Okla. 120, 12 P.2d 881; City of Tulsa v. Commissioners of the Land Office, 187 Okla. 82, 101 P.2d 246, and Lynch v. Clements (Okla.), 263 P.2d 153, all are predicated on the proposition that the bed of the navigable portions of the Arkansas ". . . was retained and held by the United States in trust for the future state and that upon admission of the State of Oklahoma to the Union in 1907, the title thereto vested and became the property of the State of Oklahoma." ---------- 39

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In the
Supreme Court of the United States

No. .....

THE CHEROKEE NATION OF TRIBE OF INDIANS OF OKLAHOMA,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents,

THE CHOCTAW NATION and the CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Choctaw and Chickasaw Nations, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 31st day of October, 1968, in causes numbered 9924 and 9925 in that court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Tenth Circuit in each of these cases was entered on the 31st day of October, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

Was the cession by Congress of lands west of the Mississippi to the Choctaws by the Treaties of 1820 and 1830 a purpose appropriate to the objects for which the United States held the territory?

When the Treaties of 1820 and 1830 were entered into was it understood between the United States and the Choctaws that the area ceded to the Choctaws was to be embraced within a future state?

STATEMENT OF THE CASE

This case involves the ownership of the avulsed beds and the soil and minerals underlying the navigable portion of the Arkansas River in Oklahoma. The State of Oklahoma claims to own all of the bed of the navigable portion of the Arkansas River within Oklahoma. The Choctaw and Chickasaw Nations also claim to own all of the bed of the navigable portion of the Arkansas River within Oklahoma. The Cherokee Nation contends that the thread of the river is the prescribed boundary between the Cherokee Nation to the north and the Choctaw Nation to the south and claims to own the bed of the navigable portion of the Arkansas River lying in the interior of the Cherokee Nation.

This action was commenced by the Cherokee Nation against the State of Oklahoma and others. The Choctaw and Chickasaw Nations intervened. The trial court entered judgment quieting title in the State of Oklahoma. The court below affirmed that judgment.

STATEMENT OF THE FACTS

Shortly after 1800 great pressures were brought upon the Federal Government to move the Indians out of the southern states. By the Treaty of 1817 the Cherokees gave up their lands in the southern states in exchange for a fee simple title to land in what is now Arkansas.

Article V of that treaty recited that the land ceded to the Cherokees ". . . is to commence on the north side of the Arkansas River, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line northwardly to strike Chataunga mountain, or the hill first above Shield's Ferry on White River, running up and between said rivers for complement, the banks of which rivers to be the lines . . ."

By the Treaty of Doak's Stand in 1820[1] the Choctaws exchanged the southwestern portion of their territory in Mississippi for the fee simple title to a wild tract of country in what is now the southern half of Oklahoma and a section of southwestern Arkansas. By that treaty the Choctaws were ceded the fee title to a tract of land west of the Mississippi River bounded as follows: "Beginning on the Arkansas River where the lower boundary of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork; and up the same to its source; thence due south to Red River; thence down Red River three miles below the mouth of Little River which empties into Red River on the north side; thence in a direct line to the beginning."

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[1] 7 Stat. 210, Proclamation, January 8, 1821.

Before the Choctaws had time to enter in possession of their new territory it was discovered that the land ceded to them in Arkansas was already occupied by white settlers. The Federal Government, realizing the difficulty of dislodging these white families, decided to induce the Choctaws to relinquish the land in Arkansas. In 1824 a delegation of Choctaws were invited to Washington to negotiate a treaty that would relocate the eastern boundary of the land ceded to them by the Treaty of 1820. On November 9, 1824, John C. Calhoun, the Secretary of War, addressed a letter to the Choctaw delegation then in Washington in which he said: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory . . ."*[2]

A treaty was entered into on January 20, 1825 in the City of Washington[3] by which the Choctaw Nation retroceded to the United States: ". . . all that portion of the land ceded to them by the second article of the Treaty of Doak Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south to Red River; it being understood that this line shall constitute, and remain, the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens as may be settled on the west side to the east side of said line, *and prevent future settlements from being made on the west thereof.*"

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[2] Ameican State Papers, Indian Affairs, Vol. II, pp. 549-551.

[3] 7 Stat. 234, Proclamation, February 19, 1825.

The emigration contemplated in the Treaty of 1820 was slow.[4]

In 1826 General William Clark, General Thomas Hinds, and General John Coffee, as Commissioners for the United States, held a council with the Choctaws in Florence, Alabama. In an address on November 11, 1826, they said to the Choctaws:

> "The United States have a large unsettled and unappropriated land on the west side of the great river Mississippi, *unto which they do not intend that their white settlers shall extend.*"[5]

On the 13th of November the commissioners submitted for the consideration of the Choctaws the terms upon which they were authorized to propose a cession by the Choctaws of their remaining lands in the State of Mississippi. The commissioners brought to the attention of the Choctaws the object of their mission, saying:

> ". . . but if you are satisfied that under such condition of things you cannot be happy, consent to move beyond the Mississippi, where you will be away from the white people and from their laws, and be able to live under your own.
>
> * * * * * * *
>
> ". . . and your white father can bring you forth; and can keep the white mans laws from interrupting and disturbing you; and there I will guard you against

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[4] By 1829 about 150 Choctaws had been induced to settle in their new territory. Debo, *Rise and Fall of the Choctaw Republic*, at page 50.

[5] American State Papers, Indian Affairs, Vol. II, page 711.

all enemies, whether they be white or red; *and no State or Territory will be created.*"[6]

The next year, the Superintendent of Indian Affairs made a special trip to the Choctaw country to induce them to remove.[7]

On May 30, 1829 the Secretary of War instructed the commissioners, Carroll and Coffee to bribe the Chiefs and Head Men by offers of extensive reservations in fee simple and other rewards.[8]

But, the people of Mississippi did not wait for the success of these Federal schemes for the removal of the Choctaws. In 1829 the Legislature provided for the extension of State laws over Choctaw and Chickasaw land adjacent to organized counties. And on January 19, 1830, Tribal governments were abolished under penalty of fine and imprisonment to any Indian who should exercise the "office of Chief, Mingo, Head Man, or other post or power established by the Tribal Statutes, ordinances or customs of the Indians."[9]

On February 22, 1873 the Committee of Indian Affairs in a report to the House of Representatives of the Third Session of the 42nd Congress in reviewing these events said: "The course adopted by the State of Mississippi was

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[6] Senate Document 512, Vol. II, pages 255-258.

[7] Niles Register XXXIII (1827) 274.

[8] Speeches on Passage of the Bill for the Removal of Indians (New York 1830) page 4.

[9] Laws of Colonial State Governments relating to Indians and Indian Affairs from 1633 to 1831 inclusive (Washington 1832) pp. 242-243; see also Niles Register XXXVIII (1830) 73.

necessarily compelling a conflict of authority between the United States and the State of Mississippi, or else an abandonment by the United States of its former treaty-stipulations with the Choctaws, and a gross violation of its agreements with them, by which it had received of the Choctaws vast tracts of country in said States of Mississippi and Alabama."

On May 28, 1830 Congress passed an act which provided: [10]

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks, as to be easily distinguished from every other.
>
> * * * * * * *
>
> Sec. 3. *"And be it further enacted,* that in making of any such exchange or exchanges, *it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them,* and, if they prefer it, that the

[10] Commonly called "The Removal Act"; U. S. Statutes at Large IX 411-12.

United States will cause a patent or grant to be made and executed to them for the same."

Shortly before Andrew Jackson took office as President, Georgia tore up Federal treaties and annexed the territory of the Cherokee and Creek Nations. Mississippi and Alabama did likewise in the case of the Choctaws and Chickasaws. The answer of the Cherokees was to engage William Wirt of Baltimore, formerly Attorney General and an eminent constitutional lawyer, to take their case into court on the issue denying a state's right to annul a Federal contract. As no state possessed this right, the outcome of any suit, once it should reach the Supreme Court, seemed a foregone conclusion.[11]

Andrew Jackson, fearing the outcome of *Worcester* v. *Georgia* and never being one to assume a posture of meekness toward the courts (particularly where Chief Justice John Marshall was concerned), directed his Secretary of War, John H. Eaton, to arrange a meeting with the Choctaws and Chickasaws at Franklin, Tennessee for August 23, 1830. So on June 1st, four days after the passage of the Removal Act, Secretary Eaton wrote the Choctaws inviting them to meet with him and the President at Franklin, Tennessee. He professed the benevolent purpose of the Government to remove them from the hostile jurisdiction of Mississippi saying:[12] "Congress has passed a law manifesting a desire that you should remove and have liberally prepared the means for taking care of you."

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[11] *Worcester* v. *Georgia*, 6 Pet. 515 (1832).

[12] Senate Document 23d Congress, 1st Session, 512 II, 3).

Commenting on the remarkable circumstance of the President of the United States journeying to an Indian Council Ground for the purpose of making a treaty, Marquis James said in his Pulitzer Prize winning biography of Jackson:[13] "General Jackson traveled westward to cut the ground from under the courts by persuading as many Indians as possible to agree to emigrate before any suit should come up for adjudication. Of the Choctaws and Chickasaws he had strong hope . . ."

When Jackson reached the meeting place only the Chickasaws had appeared. His overtures to the Chickasaws were characteristic of the advances his commissioners were to make to the Choctaws the following month at Dancing Rabbit Creek. They show beyond controversy the intent of the Government that the lands west of the Mississippi to which the southern Indians were proposed to be moved would never become a part of any State or Territory. Hear the suasions of Jackson:[14]

> ". . . Brothers, you have long dwelt upon the soil you occupy; and in early times, before the white man kindled his fires too near to yours, and by settling around, narrowed down the limits of the chase, you were, though uninstructed, yet a happy people. Now, your white brothers are around you; they compass you about every where; states have been created within

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[13] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2 at page 246.

[14] Senate Documents Indian Removals 23d Congress 1st Session. Document 512 (Vol. II) Correspondence on the subject of the Emigration of Indians, between November 30, 1831 and December 27, 1833. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

your limits, which claim a right to govern and control your people as they do their own citizens, and to make them answerable to their civil and criminal codes. Your great father has not the authority to prevent this state of things, and he now asks if you are prepared and ready to submit yourselves to the laws of Mississippi; make a surrender of your ancient laws and customs, and peaceably and quietly live under those of the white man.

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"Brothers, listen: to these laws, where you are, you must submit, there is no preventative, no alternative. Your great father cannot, nor can Congress, prevent it; the states only can. What then? Do you believe that you can live under those laws? That you can surrender all your ancient habits, and the forms by which you have been so long controlled? If so, your great father has nothing to say or to advise. He has only to express a hope, that you may find happiness in the determination you shall make, whatever it may be. His earnest desire is, that you may be perpetuated and preserved as a nation; and this, he believes, can only be done and secured by your consent to remove to a country beyond the Mississippi, *which, for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone.* Where you are, it is not possible you can live contented and happy. Besides, the laws of Mississippi which must operate upon you, and which your great father cannot prevent, white men, continually intruding, are with difficulty kept off your lands, and every day inconveniences and difficulties continue to increase around you.

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"Brothers, listen: The only plan by which this can be done, and tranquillity for your people obtained, is,

that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.

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"Peace invites you there, annoyance will be left behind; *within your limits, no State or Territorial authority will be permitted;* intruders, traders and above all, ardent spirits, so destructible to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission."

Marquis James recounts: [15] "The Indian dignitaries retired for consultation. General Jackson stepped into his carriage and drove away, leaving John Henry Eaton and General John Coffee to complete the negotiations. At the Hermitage he received word of the Chickasaws capitulation. They would cross the Mississippi in 1832. Meantime the Choctaws agreed to treat. Directing Eaton and Coffee to meet them, the President set out for Washington the first week in September."

Secretary Eaton and General Coffee proceeded from Franklin, Tennessee to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on September 15, 1830. On September 18th they exhorted the Choctaws:

"Brothers: hesitate not, determine what you mean to do on this important occasion; record the votes of your head-men, and let us know who amongst you are

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[15] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2 at page 248.

willing to remove and who are opposed. The sense of the nation will thus be correctly ascertained, and the question which has so much agitated you be finally put to rest: say it is your determination to remain, and the subject is done with—we shall then trouble you with our talks no more. But decide to remove, and liberal provisions will be made to carry you to a country where you can be happy, and where already your fathers and brothers have gone in peace to reside. It is a desirable region, double in extent to the one you occupy, and large and fertile enough for twice or three times the number of people you have. There your great father can be your friend; there he can keep the white man's laws from interrupting and disturbing you; and there, too, he will guard you against all enemies, whether they be white or red. *There no State or Territory will be created* and he will have it in his power to protect you fully in your usages, laws, and customs. Here he cannot do these things, because neither he nor Congress possess authority to prevent the States from extending their jurisdiction over you, and throughout their limits.

* * * * * * *

"Brothers: a fertile country beyond the Mississippi and another possessed here, is more than you should expect. If you will not remove other Indian tribes may desire to do so; and, where they shall select to settle, a home must be furnished: others wanting it, the country should not remain a desert. You must decide which you will take, and which you will live upon: both countries you cannot possess—it is unreasonable to expect it. If you prefer to live under our laws and customs, remain and do so, and surrender the lands assigned to you west of the Mississippi, or otherwise remove to them. There your great father can protect you; and there, undisturbed and uninterrupted by the

whites, you can enjoy yourselves, be happy, now and for years to come . . ."[16]

A treaty was concluded on September 27th and a supplement was adopted on September 28th.[17] It provided that "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, *in fee simple* to them and their descendants, to inure to them while they shall exist as a nation, and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; *if in the limits of the United States,* or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the Treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present Treaty shall be ratified."

Article IV of the treaty provided that: "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of all the persons and property that may be within their limits west, *so that no territory or State shall ever have a right to pass laws for the*

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[16] Senate Documents Indian Removals, 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, pp. 256, 257, 258.

[17] Treaty at Dancing Rabbit Creek September 27, 1830, 7 Stat. 333, Proclamation February 24, 1831.

government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted to them shall ever be embraced in any Territory or State; . . ."[18]

For three-quarters of a century this guarantee was to be the Magna Carta of the national existence of the Choctaw Nation.

THE DECISION OF THE COURT BELOW

The Circuit Court's decision is premised on the conclusion that when the United States ceded the land in what is now a part of Oklahoma to the Choctaws by the Treaty at Doak's Stand in 1820 there was a well-grounded intention that the area should later be embraced by a state.[19]

While the title to the beds underlying navigable waters passes to the new states under the "equal footing doctrine,"

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[18] The removal of the Five Civilized Tribes from the southern states was a concerted effort. It was intended that they should all be removed to lands west of the Mississippi. Article V of the treaty concluded at New Echota on the 29th day of December 1835 (7 Stat. 478 Proclamation May 23, 1836), provided that: "The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing Article I, in no future time without their consent, be included within the territorial limits or jurisdiction of any state, or territory."

[19] The court in its opinion (Appendix, p. xi) said: "Nothing in the treaties, statute or conveyances establishes an intent by the *United States, as trustee for states to be formed,* to convey away property *held for the benefit of the new states.*" (Emphasis supplied) and at page xiv of our Appendix the court below said: "It requires a clear and definite intent to convey the beds of navigable streams *which otherwise would pass to a state on admission* . . . The responsibility of the United States *to the new states* is not less than its responsibility to the Indians." (Emphasis supplied.)

the court below recognized that this Court had established in *Shively* v. *Bowlby*, 152 U.S. 1, 48, that Congress had the power to grant land below navigable waters in a Territory when necessary to carry out public purposes appropriate to the objects for which the United States held the territory.[20] But, said the court below, under *United States* v. *Holt State Bank*, 270 U.S. 49, 55, the intent of Congress to dispose of the soil under the waters of navigable streams during the territorial period must be "definitely declared or otherwise made very plain."[21]

The question, said the court below, is whether the circumstances surrounding the treaties at Doak's Stand in 1820 and at Dancing Rabbit Creek in 1830 ". . . make that intent *very plain*."[22]

Recognizing that *Holt State Bank* did not deal with a claim presented by Indians and that the United States was not a party to the case, the court below said that it nonetheless believed that the rule announced in that decision must apply to the instant case, saying: "It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission * * * The responsibility of the United States to the new states is not less than its responsibility to the Indians * * * Nothing in the treaties, statutes and conveyances establish an intent by the United States, as trustee for states to be

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[20] Appendix, pages vii and viii.

[21] Appendix, page viii.

[22] Appendix, page x.

formed, to convey away property held for the benefit of the new states."[23]

The court below pointed out that in treaties with other tribes the United States had agreed that the territory ceded or reserved to the Indians would not be embraced in any State or Territory. But states were in fact later formed that would embrace these tracts.[24]

Evidently the court below felt that a chaotic condition might result if it should be said that a State could be admitted to the Union without becoming the owner of the soil under the navigational waters within its boundaries. Thus said the court:[25] "From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state. * * * The acceptance of this position would have widespread implications because as we have seen, other states were created in areas covered by Indian Treaties having similar provisions to those found in the treaties of New Echota and Dancing Rabbit Creek."[26]

While we shall comment on it later it is well to observe at this point, however, that the decision of the court below turned on its construction of *United States* v. *Holt State Bank*. In that case this Court said[27] that where Congress had granted lands underlying navigable waters by

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[23] Appendix, page xiv.

[24] Appendix, pages vi and x.

[25] Appendix, page x.

[26] Appendix, pages x and xi.

[27] 270 U.S. 49, 54, 55.

way of carrying out public purposes appropriate to the objects for which the territory was held:

> "Such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and *the rights which otherwise would pass to the state in virtue of its admission to the Union are restricted or qualified accordingly.*" (Emphasis supplied.)

At this point in its opinion the court below said that it believed that the provisions that no states would be created in the areas west of the Mississippi ceded to the Choctaws ". . . had to do with the exercise of political power rather than property rights. The political aspects were changed by the Indians' acceptance of the treaty provisions concerned with the creation of State and Territory governments."[28]

The definition of terms in the sentence: "We believe that such provisions had to do with the exercise of political power rather than with property rights" is clarified in the next paragraph of the opinion of the court below where it said: "We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional power of the United States, if it has any effect at all, negatives any intent to convey the riverbed."[29]

We gather that by this language the court below is reiterating its belief that in treating with the Choctaws the United States intended that the bed of the navigable por-

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[28] Appendix, page xi.

[29] Appendix, page xi.

tion of the Arkansas was not to be included in the grant but was to be withheld by the United States in trust for a future state that would embrace that area.

We must dwell for a minute on the conclusion of the court below that the recognition in the treaties with the Choctaws and the Cherokees of the constitutional power of the United States, ". . . if it has any effect at all, negatives any intent to convey the riverbed." The court by footnote refers to Article IV of the Treaty with the Choctaws of 1830[30] and Article V of the Treaty with the Cherokees of 1835.[31] These two articles are substantially the same. In each of them the Government covenanted that they would secure to the respective tribes the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Tribes; and that no part of the land granted to them should ever be embraced in any Territory or State; but that the United States should forever secure the Tribes from and against all laws except such as from time to time may be enacted by their own councils, not inconsistent with the Constitution, Treaties and laws of the United States.

It is respectfully suggested that by these Articles the United States was saying to the Tribes: "The lands granted to you shall never be embraced by any State or Territory and you may govern yourselves except that you shall pass

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[30] 7 Stat. 333.

[31] 7 Stat. 478.

no law contravening the Constitution, Treaties or laws of the United States." No matter how earnestly one searches there cannot be found in those Articles any intent, expressed openly or esoterically, to withhold the soil underlying navigable waters from the grant.

REASONS FOR GRANTING THE WRIT

It is well established that Congress has the power to grant land below navigable waters in a Territory when necessary to carry out public purposes appropriate to the objects for which the United States holds the Territory.[32]

These questions are posed: *First,* did the Indian Removal Act of 1830[33] making it lawful for the President of the United States to remove the southern Indians to the Territory west of the Mississippi River and ". . . to assure the Tribe or Nation with which the exchange is made, that the United States will forever secure their guarantee to them, and their heirs or successors, the country so exchanged with them, and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same" evince a public purpose that was appropriate to the object for which the United States held the Territory? *Second,* was the granting to the Choctaws of a fee simple title to the lands ceded to them in what is now Oklahoma a purpose appropriate to the object for which the United States held the Territory? *Third,* was the removal of the Choctaws and Cherokees from the

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[32] *Shively* v. *Bowlby,* 152 U.S. 1, 48.

[33] U. S. Statutes at Large IX 411-42.

southern states to the lands west of the Mississippi an "exceptional circumstance"? *Fourth,* Was it made "very plain" to the Choctaws that as a condition to their removing to the wild lands in what is now Oklahoma the lands granted to them would never be embraced by a state? *Fifth,* If there is a "well founded doubt" as to whether the United States intended to reserve the soil underlying the navigable portion of the Arkansas River from the grant of the treaties at Doak's Stand in 1820 and at Dancing Rabbit Creek in 1830 and its patent of 1842, in whose favor should the doubt be resolved?

Under the Constitution, the United States has the power to convey a fee simple title to Indian Tribes.

Indian Tribes are capable of taking lands as owners in fee simple by purchase where the United States for a valuable and adequate consideration so sell such lands to them.[34]

In an opinion delivered by Mr. Justice Reed, in *Hynes* v. *Grimes Packing Company,* 337 U.S. 86, 103, 104, 93 L.Ed. 1231, 1247, the Court said:

> "Since Congress, under the Constitution, Section 3 of Article 4, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, *even a title equal to fee simple, as in its judgment is just.* Northwestern Band of Shoshone Indians v. United States, 324 U. S. 335, 339, 340, 89 L. ed. 985, 990, 991, 65 Sup. Ct. 690." (Emphasis supplied.)

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[34] 42 C.J.S. 694, 27 Am. Jur. 566 and authorities cited thereat.

By the Treaty at Doak's Stand in 1820 and the Treaty at Dancing Rabbit Creek in 1830, the United States conveyed to the Choctaw Nation the fee simple title to the lands west of the Mississippi situated in what is now Oklahoma.

By Article I of the Treaty concluded at Doak's Stand on April 18, 1820, the Choctaws ceded to the United States a part of the lands owned by them in Mississippi.[35] Article II of the Treaty provides:

> "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States on behalf of the United States, do hereby cede to said Nation, a tract of country west of the Mississippi River . . ."

On September 27, 1830, the United States entered another treaty with the Choctaws at Dancing Rabbit Creek[36] by which the Choctaws ceded to the United States the rest of the land they owned in Mississippi. The treaty provided for minor gifts to the Indians and by Article II the United States again conveyed to the Choctaw Nation the lands west of the Mississippi River situated in what is now Oklahoma:

> ". . . in fee simple, to them and to their descendants, to inure to them while they shall exist as a nation and live on it . . ."

Mr. Justice Holmes speaking for the Court in *Fleming* v. *McCurtain*, 215 U.S. 56, 59, 54 L.Ed. 88, 91, said:

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[35] 7 Stat. 210.

[36] 7 Stat. 333.

"We should mention, however, that the United States already had ceded this tract to the Choctaw Nation with no qualifying words by the Treaty of October 18, 1820 (Art. II, 7 Stat. at L. 210 Choctaw Nation v. United States, 119 U. S. 1, 38, 30 L. ed. 306, 318, 7 Sup. Ct. Rep. 75. The Treaty of 1830 only varied the description a little and provided for a special patent."

The conveyance of the fee title to the lands in Oklahoma to the Choctaws by the Treaties of 1820 and 1830 and by the patent of 1842 and the removal of the Choctaws on to those lands were each "a public purpose appropriate to the objectives for which the United States held the Territory."

The desire of the Federal Government to move Indians out of the southern states is such a commonly known fact that the Court may take judicial notice of it. It would be an unnecessary labor upon the Court to cite the endless historical writings on the subject. But this desire was succinctly expressed by Generals Clark, Thomas and Hinds, who, as commissioners of the United States negotiating for the removal of the Choctaws, said to them in an address at the Treaty Ground of the Choctaw Nation on November 11, 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children. * * * We shall now proceed to state the views which the General Government of the United States has at present in contemplation. It is the policy and interest of the Government to extinguish the Indian title to all the lands on this side of the Mississippi."[37]

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[37] American State Papers, Indian Affairs, Vol. II, page 741.

For brevity it need only be added that the Indian Removal Act of 1830 making it lawful for the President of the United States to cause so much of any territory belonging to the United States west of the Mississippi River not included in any state or organized territory and to which the Indian title had been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or Nations of Indians as he might choose to exchange the lands where they now reside and remove them there, clearly evinced a public purpose that was appropriate to the objects for which the United States held the territory.

It can not be said that the United States intended to reserve the bed of the navigable portion of the Arkansas for the benefit of a future state.

John C. Calhoun, the Secretary of War of the United States, urging the Choctaws to retrocede to the United States that part of their lands lying in Arkansas, said to their delegation in Washington in 1824: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory . . ."*[38] Two months later Calhoun's negotiations with the Choctaw delegation in Washington resulted in the Treaty of 1825,[39] which established the permanent boundary line between the United States and the Choctaws and in which the United States agreed in reference to such line that it would ". . . *prevent future settlements from being made on the west thereof.*"

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[38] 7 Stat. 234, Proclamation, February 19, 1825.

[39] American State Papers, Vol. II, pages 549-550.

On November 11, 1826 at the Treaty Grounds of the Choctaws, General William Clark, General Thomas Hinds and General John Coffee said to them: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi *into which they do not intend that their white settlers shall extend.* This is the country in which our father the President intends to settle all his Red Children."

In urging the Chickasaws to move to the west President Jackson said to them in August, 1830 at Franklin, Tennessee: "Peace invites you there, annoyances will be left behind; *within your limits no State or territorial authority will be permitted.*"

Jackson's Secretary of War, John H. Eaton, and General Coffee were with him at Franklin, Tennessee. On his instructions they proceeded on to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on September 15, 1830. On September 18th they exhorted the Choctaws to move to the country west of the Mississippi, pledging to them that out of the lands to be ceded them, west of the Mississippi, ". . . *no State or Territory will be created . . .*"[40]

Article IV of the treaty concluded with the Choctaws at Dancing Rabbit Creek on September 27, 1830 was a result of these pledges. It provided that:

> "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of

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[40] Senate Documents Indian Removals 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, page 257.

all the persons and property that may be within their limits west, so that no territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that *no part of the land granted to them shall ever be embraced in any Territory or State; . . .*"

The Treaty of Dancing Rabbit Creek, September of 1830 was negotiated by the Secretary of War, John H. Eaton, and General John Coffee for and in behalf of the United States, with Greenwood LeFlore, Moshulatubbee, and Nitakechi, for the Choctaws. We can imagine the following conversation between Mr. Eaton for the United States and Moshulatubbee for the Choctaws at the signing of the treaty:

Mr. Eaton: The treaty is ready for our signatures, and there is nothing wrong with what has been written, but I now see that an important provision has been omitted.

Moshulatubbee: What is that?

Mr. Eaton: There should be a provision in the treaty that the United States reserves the ownership of the sands and soils in the bed of the Arkansas River.

Moshulatubbee: Why in the world would you want a long strip of sand and soil in the heart of the Indian country?

Mr. Eaton: The Arkansas is a navigable river, and it has long been the policy of the United States to reserve the beds of navigable rivers for future states.

Moshulatubbee: But, you forget that this treaty provides that no state or territorial government shall

ever be established along the lands that you have granted us, and the Cherokee treaty to the north contains a like provision.

Mr. Eaton: But we need this provision. The War Department through its engineers needs to remove the stumps from the river so we can get our boats up to Fort Gibson.

Greenwood LeFlore: But in Article IV you have provided that the laws passed by the Choctaws' National Council shall be not inconsistent with the Constitution, treaties and laws of the United States, and your power to regulate commerce is enough for your purpose without ownership of the riverbed.

United States v. Holt State Bank is not a relevant precedent because without any qualifying words the Government conveyed to the Choctaws a fee simple title to the lands ceded to them in what is now Oklahoma and further guaranteed ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

On discovery of the American continent, the principle was asserted and acknowledged by all European nations that discovery followed by actual possession gave title to the Government by whose subject and authority it was made, not only against other European governments, but against the natives themselves.[41]

In the United States, the right of the European discoverers, having been succeeded to by the states or by the Federal Government, the Indian title to land is a right of possession and occupancy, the fee being in the Federal

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[41] *Butts* v. *Northern Pacific Railway*, 7 Sup.Ct. 100, 119 U.S. 55; *Beecher* v. *Wetherby*, 95 U.S. 517.

Government.[42] However, under the Constitution the United States has the power to convey a fee simple title to Indian Tribes.[43]

In *United States* v. *Holt State Bank*[44] the fee was in the United States, the Indians having only a right of occupancy. In the case at bar, however, the fee was in the Choctaws. This significant fact interdicts *United States* v. *Holt State Bank*.[45]

The claim of the Choctaws in the case at bar is bottomed on the premise that by the treaties of 1820 and 1830 and the patent of 1842 they became the owners of the fee simple title to the lands ceded to them in what is now Oklahoma and in making the grant to them the Government guaranteed that the area would never be embraced by any State or Territory. Conversely, *United States* v. *Holt State Bank* is bottomed on the premise that the fee to the lands involved there was vested in the Government,

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42 *U. S.* v. *Santa Fe Pacific Railway Company*, 314 U.S. 339, 312 U.S. 695; *M. K. & T. Railway Co.* v. *U. S.*, 235 U.S. 37.

43 *Hynes* v. *Grimes Packing Company*, 337 U.S. 86, 103, 104.

44 270 U.S. 49, 70 L.Ed. 465.

45 The case at bar deals with the construction of Article II of the Treaty entered into with the Choctaws at Dancing Rabbit Creek on September 27, 1830 (7 Stat. 333) which provides: "The United States under grant especially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of the country west of the Mississippi river *in fee simple . . .*" *United States* v. *Holt State Bank* dealt with the Chippewa treaty entered in the City of Washington on February 22, 1855 (10 Stat. 1165), the first article of which provided: "And the said Indians do hereby fully and entirely relinquish and convey to the United States any and all right, title and interest, of whatever nature the same may be, which they may now have, and to any other lands in the Territory of Minnesota or elsewhere."

the Indians having only a right of occupancy,[46] and that the area would be embraced by a future state.

In *United States* v. *Holt State Bank* the Indian tribe was the grantor. The Government was the grantee. The Court noted[47] that when the Indian tribe made the cession to the Government: "There was no formal setting apart of what was not ceded . . ." The Court is there saying that the Chippewas were the grantors and had they wanted to keep the soil and the minerals underlying Mud Lake, they should have formally set them apart from their cession.

This Court in reviewing the treaties between the Chippewas and the United States did not find in *United States* v. *Holt State Bank:* ". . . anything evidencing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state."[48]

The *sine qua non* of Minnesota's ownership of the soil and minerals underlying Mud Lake are: *First*, the lands were not ceded by the United States to the Chippewas. The reverse was true. The Chippewas ceded the land to the United States without any reservation except the right of occupancy. *Second*, the Chippewas having ceded the lands to the United States prior to Minnesota becoming a State, the policy of treating lands underlying navigable waters for the benefit of future states became applicable.

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[46] The Court observed at 270 U.S. 58, 70 L.Ed. 470: "The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. Minnesota v. Hitchcock, 185 U.S. 373, 389, 46 L.Ed. 954, 963, 22 Sup.Ct. Rep. 650."

[47] First column, 70 L.Ed. 470.

[48] 270 U.S. 58, 70 L.Ed. 470.

But the absolute prerequisites to Oklahoma's ownership of the soil and minerals underlying the navigable portion of the Arkansas River within its borders are missing from the case at bar. For here without qualifying words the United States had conveyed to the Choctaws the fee simple title to their lands in what is now Oklahoma. And here the policy of retaining the bed of navigable streams in those lands for the benefit of a future State has no application because the United States had by treaty specifically guaranteed the Choctaws *"that no part of the lands granted to them shall ever be embraced in any Territory or State"* (Article IV of the Treaty of 1830).

Paraphrased to reflect the facts in the case at bar, *United States* v. *Holt State Bank* would have read:

> The United States was the grantor of the patent of 1842 conveying to the Choctaws without any qualifying words the fee simple title to their lands in what is now Oklahoma. *There was no formal setting apart of what was not ceded.* The guarantee given by the United States in its treaties with the Choctaws that no part of the lands granted to them shall ever be embraced in any Territory or State *evinced a purpose to depart from the established policy of treating such lands as held for the benefit of a future state.*

Had this Court been addressing itself to the facts in the case at bar it would have said in *United States* v. *Holt State Bank* that, as the Government was the grantor of the lands in what is now Oklahoma and the Choctaws were the grantees, and that it was not intended in either 1820 or 1830 that the lands should be embraced in a future State or Territory, if the Government had wanted to keep the

soil and the minerals underlying the navigable streams in those lands, it should have formally set them apart from its grant.

In effect the court below's construction of Northern Pacific Railway Company v. Soderberg, 188 U.S. 526, 534 and Caldwell v. United States, 250 U.S. 14, 20, vitiates Choctaw Nation v. United States, 119 U.S. 1, 27, 28, 31 L.Ed. 313, Jones v. Meehan, 117 U.S. 1, 10, 11, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883 and the stipulation in the last sentence of Article XVIII of the Treaty concluded at Dancing Rabbit Creek in 1830 that ". . . in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably to the Choctaws."

In its opinion (Appendix, page xiv) the court below said: "We recognize that an Indian treaty is to be liberally construed in favor of the Indians as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection. Another rule of construction is that in a grant by the sovereign nothing passes by implication.", citing *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States*. The court below then said: "*Holt State Bank* extends this rule to a situation relating to Indian lands and the equal footing-implied trust doctrine. Although *Holt State Bank* did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. *It requires a plain and definite intent to convey the bed of navigable rivers which otherwise would pass to a state on admission.* * * * Nothing in

the treaties, statutes or conveyances establishes an intent by the United States, *as trustee for states to be formed,* to convey away property held for the benefit of the new states." (Emphasis supplied.)

The pith of the decision of the court below is that a construction of the treaties of 1820 and 1830 must be adopted which would have supported a claim of the United States to the soil and minerals underlying the navigable portion of the Arkansas River in the area ceded to the Choctaws if that claim had been asserted immediately after the signing of those treaties.

The court below thus placed this Court's decisions in *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States, vis-a-vis* its decisions in *Choctaw Nation* v. *United States, Jones* v. *Meehan, Choctaw Nation of Indians* v. *United States, Winters* v. *U. S.*, 207 U.S. 564, 576, 577, *Worcester* v. *Georgia*, 6 Pet. 515, 582, 8 L.Ed. 483, 508, *Carpenter* v. *Shaw*, 280 U.S. 263.

Northern Pacific Railway Company v. *Soderberg* was a bill filed by the railway company to enjoin Soderberg from taking granite from land which he had taken possession under a mineral location and for an account of the granite quarried or removed. The railway company alleged its incorporation under the Act of July 2, 1864 (13 Stat. 365) and the grant to it by that Act of every alternate odd-numbered section of public land, not mineral, and to the amount of twenty alternate sections per mile on each side of the line when passing through the territories. The bill further alleged that the principal value of the land in dispute consisted of a ledge of granite; that in 1898 Soderberg

entered upon the land and began to quarry and remove the granite under a mineral location. Soderberg answered that the lands were mineral in character and as such excepted from the Act.

The construction of that grant was governed by the general rule—". . . that grants from the sovereign should receive a strict construction,—a construction which would support the claim of the government rather than that of the individual."

Caldwell v. *United States* was an action brought by Caldwell to recover the value of certain timber cut from the public lands of the United States in the State of Colorado[49] Caldwell based his right of recovery upon contracts with the Denver, Northwestern and Pacific Railway Company which had been given the right by the Act of Congress of March 3, 1875 (18 Stat. 482) to take from the public lands adjacent to its line, timber necessary for the construction of its railroad. Under contract with the railway company Caldwell moved from lands adjacent to the railroad approximately 88,000 ties and delivered them to the company. After the ties were moved a large amount of "tie slash" was left. Caldwell attempted to sell about 200 cars of "tie slashes" to the Frazier River Timber Company and to the Leyden Coal Company to be used as mining props. Officers of the Forest Service refused to allow Caldwell's transferees to have a large portion of the "tie slash" which they took possession of and sold, the proceeds being

[49] Called "tie slash" and "tie slashing," the term being used to describe the tops of trees, the bodies of which had been used for making railroad ties.

placed in the treasury of the United States. Caldwell then brought that action to recover the sums paid into the treasury of the United States claiming that there was no provision in the Act of March 3, 1875 for disposition of what remained of trees after portions of them had been used for making ties for railroad purposes. He argued that the railroad company was entitled to the "tie slash" as incident to its right to cut under the Act of Congress. This Court held that grants such as the one given by the Act of March 3, 1875 must be construed favorably to the Government; that nothing passed but what was conveyed in clear and explicit language—inferences being resolved not against but for the Government.

The facts in the case at bar are not faintly suggestive of those in *Northern Pacific Railroad Company* v. *Soderberg* or *Caldwell* v. *United States*. For the United States stipulated by the last sentence in Article XVII of the treaty concluded at Dancing Rabbit Creek in 1830 that:

> ". . . in the construction of this treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

This provision reflects the policies established by both the Government and the courts before the Treaty at Dancing Rabbit Creek and followed without exception since. Thus, we hear this Court saying in *Choctaw Nation* v. *United States*, 119 U.S. 1, 27, 28, 30 L.Ed. 315 (1886):

> "It had accordingly been said in the case of Worcester v. Georgia, 6 Peters, 582 (31 U.S. bk. 8, L.ed. 508): 'The language used in treaties with the Indians should never be construed to their prejudice. If words

be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorized the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them. The rule of interpretation already stated, as arising out of the

nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves."

And again in 1943 in *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883:

"Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. Factor v. Laubenheimer, 280 US 276, 294, 295, 78 L.ed. 315, 324, 325, 54 S. Ct. 191, Cook v. United States, 288 US 102, 112, 77 L.ed. 641, 646, 53 S. Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible in the sense in which the Indians understood them, and 'In a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' Tulee v. Washington, 315 US 681, 684, 685, 86 L.ed. 1115, 1119, 1120, 62 S. Ct. 862. See also United States v. Shoshone Tribe, 304 US 111, 116, 82 L.ed. 306, 315, 7 S. Ct. 75."

In *Jones* v. *Meehan*, 175 U.S. 1, 10, 11, this Court said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that

the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The court below's construction of *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States* vitiates the rule enunciated by this Court in *Choctaw Nation* v. *United States,* 119 U.S. 1; *Jones* v. *Meehan,* 117 U.S. 1; *Choctaw Nation of Indians* v. *U. S.,* 318 U.S. 423; *Worcester* v. *Georgia,* 6 Pet. 515; *Carpenter* v. *Shaw,* 280 U.S. 263, and the provisions in the treaty of September 27, 1830 with the Choctaws that ". . . in the construction of this treaty wherever well-founded doubt shall arise it shall be construed most favorably to the Choctaws."

The only possible reason the United States would have had for retaining the title to the beds of navigable streams within the lands ceded to the Choctaws would have been that it was reserving them in trust for future states. But when the Treaty at Doak's Stand of 1820 and the Treaty at Dancing Rabbit Creek of 1830 were entered into neither the United States nor the Choctaws intended that the lands ceded to the Choctaws should ever be embraced within a State. The United States, therefore, could not have had any intent to reserve from the grant of the treaties the soils and minerals underlying navigable portions of rivers within the land ceded to the Choctaws for the benefit of a future state.

In its briefs to the courts below the State excerpted a sentence from Article XI of the Treaty of 1830 which provided "navigable streams shall be free to the Choctaws who shall pay no higher toll or duties than citizens of the United States"[50] and said that this sentence was a clear indication that the United States was retaining the title to the bed of navigable streams within the areas ceded to the Choctaws. What the State did was to excerpt that sentence from Article XI and attempt to have it read out of context. The whole of Article XI reads:

> "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the United States. It is further agreed that the United States shall establish one or more post offices in said Nation, and may establish such military post roads, and posts as they may consider necessary."

It was in relation to this claim of the State that the Choctaws said in its briefs to the courts below that in view of the circumstances existing at the time the treaties with

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[50] A similar provision was found in many other Indian Treaties. In a Treaty with the Cherokees approved July 2, 1791, 7 Stat. 39, 2 Kappler 22, a Cherokee boundary was established in Article V of the Treaty which reads as follows:

> "It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the Tennessee river."

In a Treaty with the Six Nations of November 1794, 7 Stat. 44, 2 Kappler 28, lands were involved along Lake Ontario and Lake Erie. Article V of this treaty provides with reference to roads, rivers and harbors, as follows:

> "And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within their respective tracts of land, for the passing and securing of ves-

the Choctaws were entered into and the objects which the Government and the Choctaws were desirous of effecting it is obvious that the Government had no need of anything but a navigation easement on the streams in the Choctaw lands and that it did not need to reserve the soil of the beds of navigable streams and the minerals underlying them in trust for a future state because at that time it was not intended that the area should ever become a part of any state. In its briefs to the courts below the Choctaws said that if that sentence posed an ambiguity then that ambiguity must be resolved most favorably to the Choctaws. The construction most favorable to the Choctaws is that by Article XI the United States retained only a navigation easement on the Arkansas River.

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sels and boats, and liberty to land their cargoes where necessary for their safety."

In a Treaty with the Sac and Foxes of November 3, 1804, 7 Stat. 84, 2 Kappler 54, the Indians gave the United States permission to establish a military post either on the upper side of the Ouisconsing or on the right bank of the Mississippi, and did further agree:

". . . that they will at all times allow to traders and other persons travelling through their country undtr the authority of the United States a free and safe passage for themselves and their property of every description. And that for such passage they shall at no time and on no account whatever be subject to any toll or exaction."

A Treaty with the Creeks, November 14, 1805, 7 Stat. 96, 2 Kappler, 62, reads as follows:

"And it is also agreed on the part of the Creek nation, that the navigation and fishery of the Ocmulgee, from its junction with the Oconee to the mouth of the Ulcofauhatchee, shall be free to the white people; provided they use no traps for taking fish; but nets and seines may be used, which shall be drawn to the easterly shore only."

By a Treaty with the Cherokees of March 22, 1816, 7 Stat. 139, 2 Kappler 87, the United States was granted the free use of certain

State v. Nolegs, 40 Okla. 479, 139 Pac. 943; Vickery v. Yahola Sand and Gravel, 158 Okla. 120, 12 P.2d 881; City of Tulsa v. Commissioners of the Land Office, 187 Okla. 82, 101 P.2d 246, and Lynch v. Clements (Okla.), 263 P.2d 153, all are predicated on the proposition that the bed of the navigable portions of the Arkansas ". . . was retained and held by the United States in trust for the future state and that upon admission of the State of Oklahoma to the Union in 1907, the title thereto vested and became the property of the State of Oklahoma."

There has never been a decision in any court of record concerning the ownership of the navigable portion of the Arkansas River in which either the Choctaw or Chickasaw Nations were parties. There has never been a decision by any court involving the ownership of the navigable portions of the bed of the Arkansas River in which the ownership of the Choctaw Nation or the effect of the Treaties at

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roads through the Cherokee nation for intercourse between the states of Tennessee and Georgia and Mississippi Territory. Article 2 of the treaty then went on to provide that:

". . . the citizens of the United States shall freely navigate and use, as a highway, all the rivers and waters within the Cherokee nation. The Cherokee nation further agree to establish and keep up, on the roads to be opened under the sanction of this article, such ferries and public houses as may be necessary for the accomodation of the citizens of the United States."

Article III of a Treaty of peace between the United States of America and the tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, of August 3, 1795, 7 Stat. 49, 2 Kappler 30, reads:

"And the said Indian tribes will also allow to the people of the United States the free use of the harbors and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety."

Doak's Stand or Dancing Rabbit Creek on the ownership of the soil underlying the navigable portion of the Arkansas was raised or taken into consideration. This is the first forum in which the Choctaw and Chickasaw Nations have had an opportunity to be heard.

In 1914, the Supreme Court of Oklahoma had before it the case of *State* v. *Nolegs*, 40 Okla. 479, 139 Pac. 943, 945. There the State of Oklahoma brought an action to quiet title to an island in the Arkansas River against Nolegs, a member of the Osage Tribe of Indians. The Jim Crow Oil Company intervened.

The Oklahoma Court held that the ownership of the navigable water and soil under them and all of the territory embraced in the Lousiana Purchase was held in trust by the Federal Government for the benefit of future states, and, as each of the states was created, the same, within the boundary of such state, passed to it, and the absolute right to the navigable waters and the soil thereunder was in the State of Oklahoma. Apparently the decision of the court was influenced by an incident which occurred in March, 1908, in which the United States Indian Agency had been asked to enter into a contract for taking sand and gravel from the Arkansas within the limits of the Cherokee Nation. At that time there were other contracts for taking sand and gravel from the Arkansas. It was contended that after statehood neither the Cherokee Nation nor the Department of the Interior had further jurisdiction to the matter and that the contractors should no longer be required to pay them royalty for sand and gravel taken from the nevigable portion of the Arkansas. The acting

commissioner of Indian Affairs held that the warranty deeds, by virtue of which the sand and gravel was being removed, became void upon Oklahoma becoming a state because, as he said: "In other words, when the United States conveyed by warranty deed the lands occupied by Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the bed of the navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall."

In the early 1930's, an action was commenced by one Vickery against the Yahola Sand and Gravel Company in which one of the issues was the ownership of the bed of the Arkansas. After an appeal was perfected to the Supreme Court of Oklahoma (158 Okla. 120, 12 P.2d 881) the State of Oklahoma *ex rel* the Commissioners of the Land Office intervened. In its opinion the court acknowledged the validity of the rule in *Shively* v. *Bowlby*[51] that Congress has the power to make grants of land below the high-water mark of navigable waters in any territory of the United States where it becomes necessary to do so in order to carry out the public purposes (second column of page 883). But then (the latter part of first column of page 885) the court reasoned that it would be far better for the Cherokees ". . . that the title to the navigable portions of the Arkansas be kept and held in the United States for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the land so granted to them."

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[51] 152 U.S. 1.

And so following these precedents the Supreme Court of Oklahoma said in *City of Tulsa* v. *Commissioners of the Land Office*, 187 Okla. 82, 101 P.2d 246, 248:

> "It was settled long ago that the ownership of the navigable waters and the soil under them in all the Territory embraced in the Louisiana Purchase was held in trust by the Federal Government, and as each of the states was created, such ownership within the boundaries of such state passed, to it, and the absolute right to the soil under such waters is in the state subject to the public rights and the paramount power of Congress over navigation, and that such ownership extends to the high water mark."

In *Lynch* v. *Clements* (Okla.), 263 P.2d 153, the Court cites its decision in *Vickery* v. *Yahola Sand and Gravel Co.*[52]

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[52] *United States* v. *Brewer-Elliott Oil and Gas Co.*, in the District Court for the Western District of Oklahoma, 249 Fed. 609, 610, affirmed by the United States Circuit Court of Appeals, *Brewer-Elliott Oil and Gas Co.* v. *United States*, 270 Fed. 100 and this Court 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140, the issue of the navigability of the Arkansas River within Oklahoma was the issue. In the body of the opinion of the Circuit Court of Appeals, Judge Sanborn speaking for the court, said: "The theory of counsel for the state is that, if this river is navigable, the United States held the title to the bed of the river below high-water mark until the admission of Oklahoma into the Union in 1907, when that title vested in the state, but that, if it was not navigable, the title to the bed in controversy vested in the Osage Tribe. This theory ignores the grave question whether or not the United States did not by the treaties and grants to which reference has been made vest in the Cherokee Nation in 1938, and thereafter in the Osage Tribe, its successor in interest, the title to this property even if the river was navigable. *Shively* v. *Bowlby*, 152 U.S. 1, 48, 58, 14 S.Ct. 548, 38 L.Ed. 331; *Alaska Pac. Fisheries* v. *U. S.*, 248 U.S. 78, 87, 90, 39 S.Ct. 40, 63 L.Ed. 138; *U. S.* v. *Roamine, et al.*, 255 Fed. 253, 260, 166 C.C.A. 423, 430; *Knight* v. *U. S. Land Assoc.*, 142 U.S. 161, 183, 184, 12 S.Ct. 258, 35 L.Ed. 974."

The thesis that references to the Arkansas River in the Treaties of 1820 and 1830 are for the purpose of establishing reference points, monuments or boundaries is tenable only if by those treaties the United States intended to retain the ownership of the navigable portion of the Arkansas River in trust for a future state.

By Article II of the treaty concluded at Doak's Stand on October 18, 1820, the United States ceded to the Choctaws a tract of land bounded as follows: "—beginning on the Arkansas River, where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River which empties into Red River on the north side; thence a direct line to the beginning."[53]

In its opinion (Appendix, page xiii) the court below said: "We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed."

It is respectfully submitted that this conclusion of the court below is at sixes and sevens with the well established rule that where the United States owns the bed of a nonnavigable stream and the upland of one or both sides, it is free when disposing of the upland to retain all or any part of the riverbed; and whether, in any particular instance, it has done so, is essentially a question of what is

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[53] 7 Stat. 210, Proclamation, January 8, 1821.

intended. If its intention is not otherwise shown it will be taken to have assented that its conveyance of the upland operate as a conveyance of the riverbed. *United States* v. *Arizona*, 295 U.S. 1, 79 L.Ed. 1267, 55 Sup. Ct. 610; *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517, 10 L.Ed. 264, 273; *Irvine* v. *Marshall*, 20 How. 558, 15 L.Ed. 994; *Gibson* v. *Chouteau*, 13 Wall. 92, 99, 20 L.Ed. 534, 536; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404, 61 L.Ed. 791, 816, 37 Sup. Ct. Rep. 387; *Kean* v. *Caulment Canal & Improv. Co.*, 190 U.S. 452, 460, 47 L.Ed. 1134, 1137, 23 Sup. Ct. Rep. 651; *Hardin* v. *Jordan*, 140 U.S. 371, 384, 35 L.Ed. 428, 434, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U.S. 406, 413, 414, 35 L.Ed. 442, 445, 11 Sup. Ct. Rep. 819, 840; *Grand Rapids & I.R. Co.* v. *Butler*, 159 U.S. 87, 92, 40 L.Ed. 85, 87, 15 Sup. Ct. Rep. 991; *Hardin* v. *Shedd*, 190 U.S. 508, 519, 47 L.Ed. 1156, 1157, 23 Sup. Ct. Rep. 685; *Whitaker* v. *McBride*, 197 U.S. 510, 512, 515, 516, 49 L.Ed. 857, 860-862, 25 Sup. Ct. Rep. 530; and see *St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 287, *et seq.*, 19 L.Ed. 74, 78.

It would be a curious thing indeed to construe the term "up the Arkansas" to mean "up the south bank of the Arkansas to the point where it becomes non-navigable and from that point up the north bank." Such a thesis could only be sustained if the United States and the Choctaws had agreed by the treaties of 1820 and 1830 that the territories conveyed to the Choctaws were to become embraced in a future state in which event of course the bed of the navigable portion of the Arkansas would then have been held by the United States in trust for the benefit of the future state. Since it is plainly evident that it was not the intent of the United States and the Choctaws at the

time they made the treaties of 1820 and 1830 that the lands ceded to the Choctaws should become a part of a state that thesis is not tenable.

Where Congress has granted lands underlying navigable waters by way of carrying out public purposes appropriate to the objects for which the territory was held such rights are not cut off by the subsequent creation of a state but remain unimpaired and the rights which otherwise would pass to the state in virtue of its admission to the Union are restricted or qualified accordingly.

This Court said in *Holt State Bank:*

"It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keokuk, 94 U. S. 324, 338, 24 L.ed. 224, 228; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 38 L.ed. 331, 348, 349, 352, 14 Sup. Ct. Rep. 548; Scott v. Lattig, 227 U. S. 229, 242, 57 L.ed. 490, 496, 44 L.R.A. (N. S.) 107, 33 Sup. Ct. Rep. 242; Seattle v. Oregon & W.R. Co., 255

U. S. 56, 63, 65 L.ed. 500, 506, 41 Sup. Ct. Rep. 237; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 67 L.ed. 140, 144, 145, 43 Sup. Ct. Rep. 60."

The court below said:[54] "From a practical standpoint the equal footing principle must be recognized and maintained. There is no place in our federal system for a second class state." Unquestionably the conclusion of the court below makes the "equal footing" doctrine so inelastic that it would not admit of any exceptions. But the court below's conclusion is inconsonant with its acknowledgment[55] of the exceptions to the "equal footing" doctrine reflected in *Moore* v. *United States* (9 Cir.), 157 F.2d 760, *cert.*, 330 U.S. 827, and in *United States* v. *Stotts* (W.D. Wash.), 49 F.2d 619, and of the several exceptions this Court cites in support of the rule so clearly and distinctly enunciated by it in *United States* v. *Holt State Bank*.

Neither the Atoka Agreement nor the Curtis Act effected a retrocession of the soil and minerals underlying the navigable portion of the Arkansas River to the United States.

In its opinion (Appendix, pages vi, vii) the court below relates the creation of a commission in 1893 to negotiate with the Choctaws and other tribes for the allottment in severalty of the tribal lands to individual members of the tribe. The court below said that the result of these negotiations was an agreement with the Choctaws ". . . which nullified treaties inconsistent therewith and which provided for the allotment of the lands." Later at pages

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[54] Appendix, page x.

[55] Appendix, page xiv.

x and xi of the Appendix, the court below discussed the provision of the Treaty at Dancing Rabbit Creek that the area ceded to the Choctaws would never be embraced by a State or Territory. The court said that it believed such provisions had to do with the exercise of political power rather than with property rights and that "the political aspects were changed by the Indians' acceptance of the nullification of the treaties." But the court goes on to say in the following sentence that the property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

This author must frankly confess that he does not understand what the court below was aiming at by that language but if it should be said that by that language the court below was holding that the Atoka Agreement and the Curtis Act (30 Stat. 495) effected a retrocession of the soil and the minerals underlying the navigable portion of the Arkansas River in Oklahoma, the Choctaws reply that nothing can be found in either the Atoka Agreement or the Curtis Act which would directly or indirectly or proximately or remotely support such a conclusion. Indeed the first proviso to Section 11 of the Curtis Act says:

> "Provided, That, nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by Act of Congress, nor be so construed as to cover any additional rights upon any parties claiming under any such Act of Congress."

The Choctaws would say further that at page x of the Appendix the court below stated the single issue on which its decision centered:

"Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent 'very plain.'"

Obviously the court below did not intend to hold that the Atoka Agreement or the Curtis Act effected a retrocession of the soil and minerals underlying the navigable portion of the Arkansas River in Oklahoma to the United States.

CONCLUSION

The removal of the Indians from the southern states to the lands west of the Mississippi was a purpose appropriate to the objects for which the United States held the territory. General Clark, General Thomas and General Hinds, who, as commissioners for the United States negotiating for the removal of the Choctaws from Mississippi, demonstrated the appropriateness of that purpose when they said to them in an address at the treaty ground of the Choctaw Nation in 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children."

The "Indian Removal Act" of May 28, 1830, making it ". . . lawful for the President of the United States to cause so many of any territory belonging to the United

States, west of the river Mississippi, not included in any State or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided unto a suitable number of districts, for the reception of such tribes of Nations of Indians as may choose to exchange the lands where they now reside and remove there . . ." was a proper method through which the United States accomplished a purpose appropriate to the object for which it held the territories.

It is settled law that Congress has the power to make grants of land below the high water mark of navigable rivers in any territory of the United States to carry out public purposes appropriate to the objects for which the United States held the territory (*Brewer-Elliott Oil and Gas Co.* v. *United States,* 260 U.S. 77, 84). It is equally well settled that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands for the purpose of carrying out purposes appropriate to which the objects for which the territory was held, such rights are not cut off by the subsequent creation of a State, but remain unimpaired, and the rights which otherwise would have passed to the State by virtue of its admission into the Union are restricted and qualified accordingly. (*United States* v. *Holt State Bank,* 270 U.S. 49, 54, 55, 70 L.Ed. 465, 468.)

John C. Calhoun's pledge to the Choctaw delegation in Washington in 1824 "There is no probability that any State or territory will be erected to the west of the Arkansas territory;" the provision in the Treaty of 1825 establishing the western boundary line of the present State of Arkan-

sas by which the United States covenanted that it would "prevent future settlements from being made on the west thereof;" the pledge of the United States given to the Choctaws through its commissioners, General Clark, General Hinds, and General Coffee in 1826 that there the United States would "guard you against all enemies, whether they be white or red; and no State or territory will be created;" the promise of the President, Andrew Jackson, to the Chickasaws at Franklin, Tennessee, on August 23, 1830, that "The United States would give them a grant for lands which should endure as long as the grass grows and the water runs" and "within your limits no State or Territorial authority will be permitted;" the assurance that Secretary Eaton and General Coffee gave to the Choctaws at Dancing Rabbit Creek in Mississippi on September 18, 1830, that "there your great Father can be your friend; and he can keep the white man's law from interrupting and disturbing you; and there, too, he will guard you against all enemies whether they be white or red. There no State or Territory will be created;" and the solemn declaration of the United States in Article IV of the Treaty of September 28, 1830, "That no part of the lands granted to them shall ever be embraced in any territory or State" leaves no room for it to be said that when the United States signed the treaties with the Choctaws it intended that the lands conveyed to the Choctaws would be embraced in a state or that it intended to reserve the soil and the minerals under the bed of the navigable portion of the Arkansas for the benefit of a future state.

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted.

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January, 1969

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
OCT 31 1968
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Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 9924 & 9925 — SEPTEMBER TERM, 1968

THE CHEROKEE NATION or Tribe of Indians in Oklahoma, THE CHOCTAW NATION and THE CHICKASAW NATION,
Appellants,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO. OF CALIFORNIA; and YAHOLA SAND AND GRAVEL CO., a Corporation,
Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma

[APPENDIX]

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Glenn R. Davis, Boesche, McDermott & Eskridge and Millard F. Carr for Tenneco Oil Company;

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Alpheus Varner for Amici Curiae Robert G. Carter, B. E. Cobb and Katherine Cobb Baker.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This controversy concerns the ownership of the bed of the Arkansas River between its confluence with the Grand River[1] and the Oklahoma-Arkansas boundary. The Cherokees, Choctaws, and Chickasaws claim under deeds for vast areas executed by the United States. Oklahoma says that under the equal footing-implied trust doctrine it received title to the beds of navigable streams upon its admission to the Union. The trial court's decision in favor of Oklahoma was made, without an evidentiary hearing, on the pleadings and matters of which it could take judicial notice. No party contends seriously that any evidence is needed or helpful.

The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injunction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed.[2]

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[1] Sometimes known as the Neosho River and as the Neosho-Grand River.

[2] This is a joint claim. It is undisputed that the Choctaws have an undivided three-fourths interest and the Chickasaws an undivided one-fourth interest. See 11 Stat. 573; 11 Stat. 611; and Chickasaw Nation v. United States, 94 Ct.Cl. 215, 237. Hereinafter reference will be made only to the Choctaws.

All parties agree that the stretch of the Arkansas River with which we are concerned is navigable in fact.[3] From the mouth of the Grand to the confluence with the Canadian, the Arkansas flows through an area granted to the Cherokees. From the mouth of the Canadian to the state boundary, the river divides the lands of the Cherokees, which lie to the north, from the lands of the Choctaws, which lie to the south. The Choctaws claim that their title goes to the north bank of the Arkansas and the Cherokees dispute this. We find it unnecessary to consider this controversy between the Tribes.

The Tribes assert owership by reason of deeds from the United States covering vast, undivided areas, the perimeters of which were described by metes and bounds. The deeds did not except the beds of navigable streams. The basic argument is that, as a simple matter of conveyancing law, title to all lands within the area vested in the Tribes. An understanding of the situation requires consideration of the circumstances in which the deeds were issued.

At the time of the independence of the United States, the Tribes occupied large areas of land in the South. Westward expansion caused increasing friction between the white settlers and the Indians. Georgia and other later formed states asserted jurisdiction over the Indians and their lands. Intolerable situations arose.[4] The states ignored efforts by the United States to protect and provide for the Indians through treaty and statute. The federal government, faced with growing strife among the Indians and

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[3] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86, the Supreme Court upheld a lower court finding that the head of navigation on the Arkansas was the mouth of the Grand.

[4] Descriptions of the condition of the Indians are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; and Choctaw Nation v. United States, 119 U.S. 1.

the states, adopted the policy of resettling the Indians on lands to the west which were not then settled by whites.

The Cherokees were first given lands near the White River in what is now the State of Arkansas.[5] Emigration was slow, and new treaties were made, providing for resettlement of all the Cherokees on land west of the Mississippi to be deeded to the Indians by the United States. In turn, the Indians surrendered their lands east of the Mississippi.[6] The Cherokees were then moved to the new lands, but the voluntariness of their migration, and of their consent to the treaties, is doubtful.

The story of the Choctaws is much the same. Relocation of that Tribe from areas east of the Mississippi was made pursuant to the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, and the Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333. The Choctaws gave up their lands in the East and received lands in the West.

The relocation of the Indians was made possible by the Louisiana Purchase of 1803,[7] in which the United States obtained the major portion of the western basin of the Mississippi River with the express intent that the inhabitants of the region "shall be incorporated in the Union of the United States."[8] Prior to relocation, however, the Cherokees and Choctaws desired protection from harassment by state and territorial governments. To induce them to move across the Mississippi, the United States agreed in the Treaty of New Echota and in the Treaty of Dancing Rabbit Creek that no part of the land granted would be

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[5] See Treaty of July 8, 1817, 7 Stat. 156, 158.

[6] See Treaty of May 6, 1828, 7 Stat. 311; Treaty of February 14, 1833, 7 Stat. 414; and Treaty of New Echota, December 29, 1835, 7 Stat. 478.

[7] Treaty of April 30, 1803, 8 Stat. 200.

[8] Id. at 202.

included in any state or territory.[9] The patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries.

In the years that followed the situation of the Indians deteriorated.[10] New territories were created in the West and new states admitted into the Union. A number of these states were in regions where Indian treaties provided that no state or territory should be created.[11] The existence of an extensive area which was held by the Indians and in which private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.[12] In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13] and the allotment of land to the individual members of the tribes. The result was an agreement with the Cherokees[14] and with the Choctaws[15] which nullified treaties inconsistent therewith and

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[9] The Treaty of New Echota provided (Art. 5, 7 Stat. 478, 481) that the lands ceded "shall, in no future time without their [the Indians'] consent, be included within the territorial limits or jurisdiction of any State or Territory." The Treaty of Dancing Rabbit Creek provided (Art. IV, 7 Stat. 333, 334) that "no part of the land granted them [the Indians] shall ever be embraced in any Territory or State."

[10] Stephens v. Cherokee Nation, 174 U.S. 445, 450-460, contains an account of conditions existing in the tribal governments and mentions their corruption and irresponsibility.

[11] See e.g. Treaty with the Senecas and Shawnees of July 20, 1831, 7 Stat. 351, 353; Treaty with the Shawnee of August 8, 1831, 7 Stat. 355, 357; and Treaty with the Ottaway of August 30, 1831, 7 Stat. 359, 361.

[12] Choate v. Trapp, 224 U.S. 665, 667.

[13] 27 Stat. 612, 645.

[14] 32 Stat. 716, 727.

[15] 32 Stat. 641, 656.

which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. 137, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians.[17]

Oklahoma was admitted into the Union in 1907 upon compliance with the conditions of the Enabling Act[18] which provided that Oklahoma should be so admitted "on an equal footing with the original States,"[19] and on the agreement that it disclaim title "to all lands * * * owned or held by any Indian or Indian Tribes."[20] By statute[21] and by court decision[22] Oklahoma has consistently maintained the position that it owns the beds underlying navigable streams. The present suit which questions that ownership was brought by the Cherokees nearly sixty years after statehood.

In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to

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16 These included the Chickasaws, Creeks, and Seminoles in addition to the Cherokees and the Choctaws.

17 34 Stat. at 148.

18 Act of June 16, 1906, 34 Stat. 267.

19 Id. at 271.

20 Id. at 279.

21 See 64 Okl.St.Ann. § 290; 60 Okl.St.Ann. § 337.

22 State v. Nolegs, 40 Okl. 479, 139 Pac. 943; Vickery v. Yahola Sand & Gravel Co., 158 Okl. 120, 12 P.2d 881; City of Tulsa v. Commissioners of Land Office, 187 Okl. 82, 101 P.2d 246; and Lynch v. Clements (Okl.), 263 P.2d 153.

the beds underlying navigable waters passes to the new states.[23] Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such dispositions except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The parties recognize the principles just stated except that the Indians and those who support them question the applicability of the Holt State Bank decision because of distinguishing facts. Before Minnesota became a state in 1858, the Chippewas ceded to the United States their aboriginal right of occupancy with the reservation of an area for continued occupation. Included therein was Mud Lake which the Court found to be navigable water. Later the Indians relinquished the area to the United States. The issue was whether the United States held title to the land on which Mud Lake was located. The Court held that the lands under the lake were not disposed of by the United States before Minnesota became a state and title passed to Minnesota on admission. Although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at bar each relate to the question of whether the United States had disposed of lands under-

[23] See Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, and Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65.

lying navigable waters before statehood. We must follow the admonition in Holt State Bank that such dispositions should not be regarded as intended in the absence of a clear showing of intent.

The United States, as amicus,[24] argues that the equal footing-implied trust doctrine has no application because of the unique character of the Cherokee and Choctaw territory under the treaties and cites Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, as supporting authority. In that case the issue was the validity of an act forfeiting a part of a railroad land grant. A claim of the railroad was that the forfeiture failed because the United States had not carried out its part of the bargain to extinguish certain Indian titles. The Court mentioned the Treaties of New Echota and Dancing Rabbit Creek and said that the extinguishment of the Indian title was for determination by Congress or by the executive officers of the federal government, or by voluntary acts of the Indians. Id. at 437-438. The Court quoted with approval the statement in Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, that the Cherokee territory "is not a foreign, but a domestic territory—a Territory which originated under our Constitution and laws."

The treaties with the Indians are not in the same category with treaties with independent foreign nations. The Supreme Court early held that English possessions in America were claimed by right of discovery rather than by right of conquest and that under international law the Indians were regarded as temporary occupiers of the soil which was disposable by the Crown.[25] The title of the

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[24] The United States disclaims any pecuniary interest in the outcome of the cases and says that it submits its views because of "its non-pecuniary obligations to represent certain Indian interests."

[25] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595, and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409.

Crown passed to the United States and the Indian lands were subject to disposition under the Constitution and laws of the United States. The agreements with the Indians, when ratified by Congress, became statutes of the United States. When grants were made to the Indians, the area granted remained under the jurisdiction of the United States and subject to its Constitution and laws.

In spite of provisions in Indian agreements that no state or territory would be created in certain areas,[26] states were created in the Northwest Territory and in the area covered by the Louisiana Purchase. In the situations before us, the Cherokees and Choctaws agreed to a nullification of the Treaties of New Echota and Dancing Rabbit Creek.[27] Oklahoma was admitted to the Union on an equal footing with the original states. From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state.

Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent "very plain."[28]

The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the

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[26] See footnote 11.

[27] See footnotes 14 and 15.

[28] United States v. Holt State Bank, 270 U.S. 49, 55.

Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

The Indians point out that the ownership of the riverbed is not necessary to the exercise of control over navigation incidental to the authority of the Government under the Commerce Clause. This proves nothing. We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional powers of the United States,[29] if it has any effect at all, negatives intent to convey the riverbed.

Pursuant to their agreements with the United States, the Indians surrendered the areas which they occupied in the South. They reason that because they gave up the beds of navigable rivers, the United States intended that they should have such riverbeds in the areas to which they were removed; and conversely they say that if they do not own the Oklahoma riverbeds, they still own the beds of the navigable rivers in the territory from which they were removed. The reasoning is unpersuasive. The Indians had an aboriginal title which was subject to the Constitution and laws of the United States. Failure to mention riverbeds does not establish an intent either to retain or relinquish title. If anything, it shows that no party had the problem in mind.

Amici Carter, et al., argue that no contemporary intent of Congress to reserve the riverbeds can be postulated because under the then existing law the concept of navi-

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[29] See Treaty of New Echota, Art. 5, 7 Stat. 478, 481, and Treaty of Dancing Rabbit Creek, Art. IV, 7 Stat. 333, 334.

gability was limited to waters affected by the rise and fall of the tides and the Arkansas was not so affected. The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides.[30] The recognition in 1832 by Kent of the English rule[31] preceded any decision by the Supreme Court on the issue and may not be taken as authoritative or persuasive. Reliance on the January 19, 1816, act of the Missouri Territorial Legislature[32] is misplaced because it adopted the common law of England except to the extent that it was not of a "local nature" and "not repugnant to, nor inconsistent with the constitution and laws of the United States." The Supreme Court has said that the ebb and flow of the tide test is not applicable to conditions in the United States. Jones v. Soulard, 65 U.S. (24 How.) 41, deals with the ownership of accretions and is not in point.

The application of the navigability principle announced in The Daniel Ball and in Barney v. Keokuk, supra, to the situation presented does not violate any rule of stare decisis. We recognize the importance of stare decisis to decisions affecting property rights.[33] There is no showing that any federal court has ever applied the tidewater rule in determining the ownership of land underlying navigable water and, particularly, there is no factual basis for any

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[30] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, and Barney v. Keokuk, 94 U.S. 324, 336. The reason is that in England all navigable rivers are affected by the tide whereas in the United States that condition is not present.

[31] See Commentaries on American Law by James Kent, 2d ed., Vol. III, p. 427.

[32] The pertinent area was then in the Territory of Missouri.

[33] In this regard the amici Carter, et al., rely heavily on the statements in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458, that in overruling The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, it was not concerned with property rights. These cases dealt with admiralty jurisdiction and have no pertinence here.

claim that the Cherokees or Choctaws ever relied on that rule to their detriment.[34]

United States v. Rands, 389 U.S. 121, is no help to the Indians. That decision recognized the dominant navigational servitude held by the United States and rejected the claim that the United States must pay compensation for land's special value as a port site. It was not concerned with the ownership of a riverbed. It does not overrule Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, which says that the soils underlying navigable water "were not granted by the Constitution to the United States, but were reserved to the several States."[35] We find nothing in the law as it was at the times of the treaties which can be taken as indicative of an intent by the United States to pass title to the riverbed of the Arkansas to the Indians.

The Indians seek comfort from the technical language of the treaties and grants. They attach significance to such phrases as "to the Arkansas River," "down the Arkansas," and "thence down the main channel of the Arkansas." We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments, or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed. Reliance on the surveys is misplaced. The surveyors could not determine the intent of the United States. Donnelly v. United States, 228 U.S. 243, is not in point. Prior to the creation of the reservation there in question, California, by an act of its legislature, had excluded the Klamath River from the navi-

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[34] In Shively v. Bowlby, supra, the Court applied the American rule in deciding the ownership of the Columbia River upon Oregon's entrance to the Union in 1859. In the Holt State Bank case, supra, the Court applied the same rule to the ownership of Mud Lake when Minnesota became a state in 1858.

[35] In United States v. Holt State Bank, 270 U.S. 49, 55, the Court said that "the United States early adopted and constantly has adhered to" the implied trust doctrine regarding lands under navigable waters.

gable class and the Court said that accordingly the river was not navigable in law. Id. at 262-263.

In Moore v. United States, 9 Cir., 157 F.2d 760, cert. denied 330 U.S. 827, and in United States v. Stotts, W.D. Wash., 49 F.2d 619, it was held that lands above low-water mark in tidal areas passed to Indians under treaties with the United States. In each case the court found a definite intent on the part of the United States to retain those lands and waters for the benefit of Indian fisheries and distinguished Holt State Bank, supra, on this ground. In the case before us we have no showing of any need by the Indians for the riverbed of the Arkansas and no expression of intent that it should pass to the Indians.

We recognize that an Indian treaty is to be liberally construed in favor of the Indians[36] as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection.[37] Another rule of construction is that in a grant by the sovereign nothing passes by implication.[38] Holt State Bank extends this rule to a situation relating to Indian lands and to the equal footing-implied trust doctrine. Although Holt State Bank did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission. Such an intent

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[36] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116.

[37] Menominee Tribe of Indians v. United States, 391 U.S. 404, 406. The Treaty of Dancing Rabbit Creek provides, Art. XVIII, 7 Stat. 333, 336, that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

[38] Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534, and Caldwell v. United States, 250 U.S. 14, 20.

is not shown by the grant of millions of acres of land which are described by perimeters. The responsibility of the United States to the new states is not less than its responsibility to the Indians.

In the final analysis the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey away property held for the benefit of the new states. When Congress passed the statutes pursuant to the Treaties of New Echota and Dancing Rabbit Creek, the lands covered were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.

In view of the disposition which we make of the case it is unnecessary to consider the jurisdiction of the court over the claim of the Choctaws against the Cherokees or the validity of that claim.

Affirmed.

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No. [redacted]

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IN THE

Supreme Court of the United States

October Term, 1968

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO OF CALIFORNIA, and YAHOLA SAND AND GRAVEL CO., a Corporation,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX

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IN THE

Supreme Court of the United States

October Term, 1968

No.

THE CHEROKEE NATION OR TRIBE
OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, the Cherokee Nation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-captioned case on October 31, 1968.[1]

[1] The Court of Appeals had before it two cases. No. 9924 involved the claim of the Cherokee Nation and No. 9925 involved the claim of the Choctaws and Chickasaws. This petition deals only with the claim of the Cherokee Nation.

CITATIONS TO OPINION BELOW

The District Court did not write an opinion in the case and the opinion of the Court of Appeals for the Tenth Circuit (Appendix A, *infra*) is reported at 402 F.2d 739.

JURISDICTION

The judgment of the United States Court of Appeals For the Tenth Circuit was entered on October 31, 1968. Mr. Justice Byron S. White on January 9, 1969, issued an order extending the time to file a petition for writ of certiorari to and including March 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Did the United States Government in 1838 impliedly reserve in trust for a future state, title to the bed of the navigable portion of the Arkansas River, under the mandate of the so-called "equal footing" doctrine when, without reservation, fee simple title to the vast area containing the river was conveyed by patent executed pursuant to valid treaty between the United States and the Cherokee Nation, as one undivided tract, the perimeters of which were described by metes and bounds, and when, the treaties with the Cherokee Nation defining the property expressly prohibited the ceded property from being included within the territorial limits or jurisdiction of any state or territory?

2. Did the Court of Appeals for the Tenth Circuit misapply as well as misconstrue the decision in *United States v. Holt State Bank,* 270 U.S. 49, so as to create a conflict between its decision and the decision of the Court in the *Holt State Bank* case?

STATUTES AND TREATIES INVOLVED

The case requires an examination of three principal treaties with the Cherokee Nation.

1. The Cherokee Treaty at Washington, D.C. with the Western (Old Settler) Cherokees May 6, 1828 [7 Stat. 311], proclaimed May 28, 1828;

2. The Cherokee Treaty at Fort Gibson with the Western (Old Settler) Cherokees February 14, 1833 [7 Stat. 414], proclaimed April 12, 1834;

3. The Cherokee Treaty at New Echota, Georgia, with the Cherokee Nation December 29, 1835 [7 Stat. 478], proclaimed May 23, 1836;

4. Patent executed by President Martin Van Buren, December 31, 1838.

Excerpts of these treaties have been reproduced as Appendices B, C, D and E, *infra.*

STATEMENT OF THE CASE

In December 1966 the Cherokee Nation filed an action in the United States Court for the Eastern District of Oklahoma against the State of Oklahoma and the holders of various mineral leases for an accounting and injunction against the use of the land underlying the bed of the Arkansas River from the point of confluence of the Grand River (sometimes known as the Neosho River and the Neosho-Grand River) to the confluence of the Canadian River and the northerly half of the river bed from that point to the Oklahoma-Arkansas border. The Cherokee Nation asserted that the land in question had been ceded by the United States to the tribe pursuant to treaties and patent deed which granted in fee simple to the Cherokee Nation the entire area without exception or reservation. The State of Oklahoma counterclaimed to quiet title on

the ground that under the equal footing-implied trust doctrine the state received title to the land underlying the river upon its admission to the Union.[2]

The Choctaw and Chickasaw Nations intervened as plaintiffs in the action claiming title to a portion of the land in question on the basis of the Choctaw Treaty of Doak's Stand, October 18, 1820, [7 Stat. 210] and the Choctaw Treaty of Dancing Rabbit Creek, September 27, 1830, [7 Stat. 333, Art. II]. The Choctaws asserted that the United States ceded a portion of the bed to the tribe when it established the northern boundary of the Choctaw tribal lands.[3]

The District Court entered its order quieting title in the State of Oklahoma and dismissed the claims of both the Cherokees and Choctaws and Chickasaws. In the Court of Appeals, the United States Government entered its appearance as *amicus curiae* and took the position that the land in question belonged to the Indians.

On appeal the court affirmed the order of the District Court and rendered its decision asserting that the land in question passed to the State of Oklahoma upon its admission to the Union on the basis of the equal footing–implied trust doctrine.

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[2] In the district court all parties stipulated that the portion of the river in dispute is navigable in fact.

[3] On page 2 of their petition for certiorari filed January 20, 1969, the Choctaws and Chickasaws claim to own *all* of the bed of the navigable portion of the Arkansas River within the State of Oklahoma. This obviously is a mistake and an overstatement of the Choctaw and Chickasaw claim. At no time in the court below did the Choctaws and Chickasaws lay claim to the river bed above the confluence of the Canadian. The portion in dispute between the tribes is the common boundary between the Cherokees and the Choctaws and Chickasaws along the Arkansas River between Canadian River and Arkansas-Oklahoma boundary line. See Appendix A at A-3.

Before this continent was discovered and the country established, the Cherokee Nation owned large tracts of land in the southern part of the United States, east of the Mississippi River aggregating some 79,986,454 acres. As early as 1785 the United States initiated a series of treaties with the Cherokee Nation with the avowed purpose of "leading the Cherokees to a greater degree of civilization" and at the same time taking land for its expanding population. In these treaties the United States acknowledged the sovereignty and integrity of the Cherokee Nation, with complete dominion and control of the land and rivers within its territory. By these treaties the United States brought the Cherokee Nation under its protection. See, *e.g.*, Treaty of Hopewell (1785).

With the westward expansion of the white settlers, despite the federal government's treaties, Cherokee land was further encroached upon and taken away. The Cherokees had little or no recourse; either move, fight or be overrun. The courts could not or would not accept jurisdiction over the tribes to grant relief. Their "only appeal was to the tomahawk or the government." See *Cherokee Nation v. State of Georgia*, 30 U.S. [5 Pet.] 1, 18.

By solemn treaty, to avoid the growing friction generated by the white settlers, the government pursued an aggressive[4] policy of moving the Cherokee Nation westward across the Mississippi River into the new lands purchased from France in 1803 under the Louisiana Purchase [8 Stat. 200].

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4 "After the enactment of the Indian Removal bill in 1830 [4 Stat. 411] several thousand more were induced to remove under Government supervision to their new western home. But the greater part of the tribe, refusing to move voluntarily, were moved from their homes at the point of the bayonet, herded into concentration camps, and forced out of the country." The Five Civilized Tribes by Grant Foreman at p. 281.

In 1817 and 1819 a few members of the Cherokee Nation (afterwards known as the "Old Settler" Cherokee) were persuaded to move into Arkansas [7 Stat. 156, 195]. Then in 1828, "the present location in Arkansas being unfavorable to their present repose"; Congress wanted to move the Cherokee farther west, with the stated purpose of establishing:

> * * * *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever–a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *. [Emphasis in original.] App. B., *infra.*

The Old Settler Cherokees with this promise, moved further westward beyond Arkansas and Missouri [7 Stat. 311]. Article 2 of the treaty set out by metes and bounds the precise area which would form the permanent home and future domain of the Cherokee Nation. See App. B, *infra.* In 1833 the United States eliminated a conflict between the Creeks and Cherokees over the boundaries of this tribal land. By treaty [7 Stat. 414] the government corrected and fixed the respective boundaries in the subject area thus completing the isolation of these tribes.[5] Pursuant to the Treaty of New Echota December 29, 1835 [7 Stat. 478], the main body of the Cherokee Nation still remaining in Georgia was moved in 1838-1839 to the new lands west of Arkansas in order to

[5] Prior to 1893, the United States pursued a policy of transferring Indian tribes from areas inhabited by white settlers and isolating the tribes from the white man. Wherever possible the Indians were given land, separate and apart from the white man, where they could carry on their way of life undisturbed.

remove the last vestige of friction between the Cherokees and the settlements in Georgia. The purpose of these treaties with the Cherokee and the other civilized tribes was to induce them to leave their lands in the east and move across the Mississippi. A at A-5.

It was expressly stated in Article 5 of the Treaty of New Echota:

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article *shall in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory*. (Emphasis added.) App. D at D-7.

The Treaty of New Echota in 1835 incorporated the granting provisions of the prior 1828 and 1833 treaties. App. D, Art. 2 at D-4.

As a practical matter after 1833 the Cherokee Nation was the treaty owner of over 7,000,000 acres[6] of land in what is now eastern Oklahoma over which it exercised complete use, dominion and control. This ownership was confirmed and manifested in the patent executed in 1838 pursuant to the Treaty of New Echota which conveyed fee simple title to the land so described. App. E. *infra.*

In 1902 the United States executed an agreement with the Cherokee Nation whereby tribal title to certain of its

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[6] See page 5, *supra.* The Cherokee Nation owned over 79,986,454 acres of land in the East before entering any treaties with the United States.

allottable[7] land was extinguished and individual grants of *allottable* land were made. Fee title to all the lands which were not so distributed remained vested in the Cherokee Nation under treaty and patent [32 Stat. 716, 727]. Thereafter in 1906, the then Territory of Oklahoma entered the Union pursuant to the Oklahoma Enabling Act [34 Stat. 267] upon the condition:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, * * *.

REASONS FOR GRANTING THE WRIT

1. In affirming the order of the District Court, the Tenth Circuit Court of Appeals erroneously applied the equal footing-implied trust doctrine. The lower Court said:

> In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States but reserved title to the several states. Because new states enter the Union on an equal footing with all other states title to the underlying navigable waters passes to the new states. App. A at A-8.

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[7] Act of July 1, 1902, 32 Stat. 716, 727 (Ch. 1375).

"Sec. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

The appellate court failed to grasp the meaning and purpose of the doctrine.[8] "From a practical standpoint the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state." Id. at A-10. This Court in *Alabama v. Texas*, 347 U.S. 272, determined that the requirement that states be admitted to the Union on equal footing with the original states does not demand that the courts wipe out diversities in the economic aspects of the several states but merely calls for parity as respects political standing and sovereignty. Indeed, Mr. Justice Reed in his concurring opinion stated the equal footing concept "does not affect Congress' power to dispose of federal property." Id. at 275.

It is a well settled principle of law that title to land once vested, as it was here by the treaty of 1835 and the patent of 1838, cannot be divested by the equal footing doctrine. In *Brewer-Elliott Oil & Gas Company v. United States*, 260 U.S. 77, Mr. Chief Justice Taft speaking for the Court stated "there was nothing in the admission of Oklahoma into a constitutional equality of power with the other states which required or permitted the devesting of title [to land]." Id. at 88.

It has been early recognized that the equal footing-implied trust doctrine does not bear upon the right of the United States to transfer title to land it owns. Compare *Spooner v. McConnell*, Fed. Cas. No. 13,245, 1 McLean 337 (CC. Ohio 1835); See, e.g., *Coyle v. Smith*,

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[8] It is interesting to analyze the facts of the *Pollard* case. Both Georgia and Virginia ceded property to the United States to be held *in trust on the condition* that a new State of Alabama was to be formed. The United States while under such condition and *after* Alabama became a state attempted to grant the land which had been under the Mobile River, contrary to state grants.

221 U.S. 559. The Oklahoma Enabling Act and the Oklahoma Constitution recognized that the equal footing-implied trust doctrine did not affect the title to land granted to and still owned by the Indians at the time Oklahoma entered the Union. See Oklahoma Enabling Act [34 Stat. at 267] and Article I, Section 3, Oklahoma Constitution. Certainly the fact that Oklahoma did not receive title to the bed of the Arkansas River does not relegate the state to any second class status.

2. The Court of Appeals in support of its decision relies upon its interpretation of *United States v. Holt State Bank*, 270 U.S. 49. The court acknowledges "although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at the bar each relate to the question of whether the United States has disposed of land underlying navigable waters before statehood." App. A at A-9. The court in arriving at its decision misread and misapplied *Holt State Bank*, so that its opinion, here under review, is in conflict with this Court's opinion in that case.

The sovereignty over the land in question was acquired by the United States under the Louisiana Purchase Agreement with France [8 Stat. 200] and the United States later acquired aboriginal Indian title by treaty and purchase from the Osages. While it held the land, the United States had the absolute right to grant for appropriate purposes, titles or rights in the land under the navigable waters. *Shively v. Bowlby*, 152 U.S. 1; *Goodtitle v. Kibbee*, 50 U.S. [9 How.] 471. It cannot for a moment be doubted that the United States in granting this undivided tract to the Cherokee Nation, acted in accordance with the interest of the Indians and for a valid public purpose.

The touchstone of the lower court's opinion is its reading of the *Holt* case. In *Holt State Bank*, the Chippewas by a series of treaties ending in 1854, just prior to Minnesota becoming a state, ceded to the United States their *aboriginal Indian title* held by right of occupancy to certain of their lands, the fee title being in the United States. The Indians continued to dwell on certain reserved portions of the land encompassing Mud Lake.

In 1858, Minnesota became a state and sometime later Mud Lake, formerly within the Indian Reservation, was drained and the State issued deeds to the reclaimed land. In 1889 the Indians ceded their lands to the United States in trust to be sold and the proceeds were to be placed to their credit (act of June 14, 1889, 25 Stat. 642). The lands so ceded included the reclaimed lands formerly constituting the bed of Mud Lake. The United States then claimed title to the land on behalf of the Indians, asserting that the United States still had title by virtue of a reservation of title to lands held by the Indians. The United States it should be noted held fee title to all the land in question within the state of Minnesota including the land reserved for the Indians. This Court determined that the land under the navigable waters passed to the state in 1858 because (1) the lands "had not been previously disposed of by the United States" and (2) "there was nothing in this which even approaches a grant of rights in lands underlying navigable waters; *nor anything evincing a purpose to depart from* the established policy before stated, of treating such lands as held for the benefit of the future state." Id. at 55, 58, 59. [Emphasis added.]

The Court of Appeals in its opinion states that *Holt State Bank* requires a clear manifestation of intent. Contrary to the language of this Cour, "nor anything evincing a purpose", the court below asserts that in a grant from the sovereign nothing passes by implication. App. A at

A-15. The Court of Appeals by this decision demands an express manifestation of intent which is a far greater requirement than was established by this Court. The Court below fails to grasp the vital distinction between Indian right of occupancy with fee title in the United States, involved in the *Holt* case, and a grant by the United States of fee title to the Cherokee Nation, involved in this case. *United States v. Creek Nation,* 295 U.S. 106. This is the crux of the *Holt State Bank* decision.

The court in its decision sets aside the fundamental concepts upon which *Holt State Bank* was premised:

(a) There is a great difference between aboriginal Indian title held by occupancy and use and fee simple title acquired expressly by treaty and/or patent. Compare *United States v. Creek Nation,* 295 U.S. 103, with *Shoshone Tribe v. United States,* 299 U.S. 476. Further it is well settled that the government can pass fee simple title to Indian tribes. *Northwestern Band of Shoshone v. United States,* 324 U.S. 335. In 1838 pursuant to the Treaty of New Echota, the government by metes and bounds conveyed fee title to the land in question to the Cherokee Nation. In *Holt State Bank* the Chippewas held only aboriginal Indian title which they ceded piecemeal to the federal government. The federal government always had fee simple title which it could grant as it saw fit. The Court in *Holt State Bank* clearly recognized that the first test was to ascertain if the federal government had disposed of the fee simple title to the property. Id at 58. In this case the Cherokee received fee simple title, without reservation, a *right* to all the land so deeded. In the *Holt State Bank* case the Chippewas had nothing approaching a right to the land underlying Mud Lake. Under *Holt State Bank* this Court would have to find that the government had parted with fee title and granted it to the Cherokee Nation before Oklahoma entered the Union.

(b) In construing treaties and patent grants with the Indians the usual rules of construction do not apply. The Indians are under the protection of the Government and treaties are to be interpreted liberally in their favor. *Jones v. Meehan*, 175 U.S. 1; *Blue Jacket v. Johnson County*, 72 U.S. [5 Wall.] 737. In *Holt State Bank*, the Court asked for *anything* that would evince a public purpose to depart from the policy of treating lands as held for the benefit of future states.

(c) The intent of Congress is to be evinced by a reading of all the applicable treaties and a consideration of all the circumstances in the light most favorable to the Indians. See, e.g., *Winters v. United States*, 207 U.S. 564; see also *Menominee Tribe of Indians v. United States*, 391 U.S. 404, footnote 2.

Unlike the Supreme Court in *Holt State Bank* which examined all the circumstances, the Court of Appeals in this case focuses on one fact, App. A at A-11, when there are numerous compelling facts. A consideration of the treaties discloses the intent of Congress to establish the Cherokee Nation in new lands over which it could exercise the same use, dominion and control as it did in its former lands. The purpose of Congress is clearly stated in the Preamble to the Treaty of New Echota:

> Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State

> sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their *views, habits* and *condition:* and as may tend to their individual comfort and their advancement in civilization. App. D, *infra.* [Emphasis added.]

See, e. g., *Worcester v. The State of Georgia,* 31 U.S. [6 Pet.] 515, 556 in which Mr. Justice Marshall speaking for Court acknowledged the rights of the Cherokee Nation to exclude the white settlers from crossing their land or navigating on the Tennessee River. Id. at 556. In *Atlantic & Pacific Railroad v. Mingus,* 165 U.S. 413, 435, 436, this Court noted the unusual relationship between the Cherokee Nation and the United States, and the land held by the Cherokee Nation, "A reference to some of the treaties under which it is held by the Indians indicates that it stands in an entirely different relation to the United States from other territories, and that for most purposes it is to be considered *an independent country.*" (Emphasis added.)

In its former lands the Cherokees had complete use and control of the rivers for fishing and transportation. It has been held in fixing the intent of Congress the court should consider the former existence and way of life of the Indian tribe. *United States v. Stotts,* 49 F.2d 619 (D.C.W.D. Wash. 1930). Certainly Congress knew the Cherokees' need of the rivers for transportation and other uses. Nonetheless, the Court of Appeals finds no intent on the part of Congress to cede the Cherokee Nation the bed to the navigable river.[9] Further, in granting this vast

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[9] The Court of Appeals in its opinion asserts that the treaties deal only with "political rights" rather than "property rights." App. A, at A-11. This ignores the circumstances and the actual language of the treaties and patent which granted *property* to the Cherokee Nation.

undivided tract to the Cherokee Nation, intent was manifested not only in the treaties, but the government executed *its first patent* with an Indian tribe expressly setting forth the ceded land by metes and bounds, physical monuments, without exception or reservation. See App. E., *infra.*

The combination of treaty and patent language evinces the clear intent of Congress to convey title to all the land within the perimeter. It has been held and it is accepted practice in conveyancing that if the language in the description of boundaries is clear, that should control. *Lowndes v. Town of Huntington,* 153 U.S. 1. "It is also a rule of construction that when one section of a statute treats specially and solely, of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto." *Griffith v. Carter,* 8 Kan. 565. See also *United States v. Elliott,* 131 F.2d 720 (10th Cir. 1942).

The lower court admits that the "patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries." App. A, at A-6. If this had been a private conveyance, unless there was a specific reservation of title, there could be no question that a strip of land in the center of a large conveyance of land was included in that conveyance. This is simply good sense, since such retained strip would be useless and the reservation purposeless. In the 1830's, when these grants were made, there was certainly no logical purpose nor intent in retaining such a strip.

It is difficult to believe that the federal government after entering these solemn treaties to provide the Cherokee Nation a *permanent home* and executing a precise

patent to a vast undivided tract, at the same time intended to and did reserve title to uncharted, and as yet unknown, navigable rivers, on the ground that the United States eventually intended to envoke "the equal footing doctrine" on behalf of a future state which it expressly stated it would not form. To admit such a fact would be to admit that the United States Government from the outset never intended to keep its word and that when the Cherokee Nation put itself under the protection of this government it waived any rights that it might have in the lands granted.

3. The case raises an important question with regard to the construction and interpretation of the treaties of 1828, 1833 and 1835, and the patent issued thereunder. The Court of Appeals by the use of language to be found in its opinion (App. A, at A-11) seems to say that because of implied "implications" and ghosts of things to come, it is proper to deprive the Cherokee of title to its tribal land. No court, including the court below, has the right to vitiate valid treaties between the United States and the Cherokee Nation and the patent issued thereunder granting fee simple title. To do so would substitute its will for the will of Congress.

CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 9924 & 9925–SEPTEMBER TERM, 1968

THE CHEROKEE NATION or Tribe of Indians in Oklahoma, THE CHOCTAW NATION and THE CHICKASAW NATION,

Appellants,

v.

STATE OF OKLAHOMA; COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA; CITIES SERVICE OIL CO.; CONTINENTAL OIL CO.; EASON OIL CO.; STEVE GOSE; JAKE L. HAMON; HUMBLE OIL AND REFINING CO.; JEFFREY SAND AND GRAVEL CO.; LONE STAR PRODUCTION CO.; MARATHON OIL CO.; MOBIL OIL CORPORATION; PAN AMERICAN PETROLEUM CORPORATION; SKELLY OIL CO.; SOUTHLAND ROYALTY CO.; STEPHENS PRODUCTION CO.; SUN OIL CO.; TENNECO OIL CO.; UNION OIL CO. OF CALIFORNIA; and YAHOLA SAND AND GRAVEL CO., a Corporation,

Appellees.

Appeal from the United States District Court
for the Eastern District of Oklahoma

Earl Boyd Pierce for Appellant The Cherokee Nation. With him on the brief were Joseph Muskrat, Andrew C. Wilcoxen and Jesse L. Ballard.

Lon Kile for Appellants The Choctaw Nation and The Chickasaw Nation.

M. Darwin Kirk for the Appellees. With him on the brief were:

G. T. Blankenship, Attorney General, for the State of Oklahoma;

N. A. Gibson for Commissioners of the Land Office of the State of Oklahoma;

Jay R. Bond and Ross, Holtzendorff & Bond for Eason Oil Company;

Varley H. Taylor for Humble Oil & Refining Co.;

Robert W. Richards and S. M. Groom, Jr., for Mobil Oil Corporation;

Judson S. Woodruff, McAfee, Dudley, Taft, Cates & Mark and S. W. Wells for Skelly Oil Company;

H. B. Watson, Jr., and Walker & Watson for Union Oil Company of California and Steve Gose;

Frederic Dorwart and Holliman, Langholz & Runnels for Lone Star Producing Co.;

David O. Cordell, Eugene A. Hoefling, Riley B. Fell and Oscar L. Hasty for Marathon Oil Company;

Glenn R. Davis, Boesche, McDermott & Eskridge and Millard F. Carr for Tenneco Oil Company;

Dale Hinson, Robert L. Trimble and Hudson, Keltner, Smith & Cunningham for Southland Royalty Company;

W. Douglas Weisbruch for Lone Star Producing Co.

Roger P. Marquis for Amicus Curiae the United States. With him on the brief were Clyde O. Martz, Assistant

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Alpheus Varner for Amici Curiae Robert G. Carter, B. E. Cobb and Katherine Cobb Baker.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

This controversy concerns the ownership of the bed of the Arkansas River between its confluence with the Grand River[1] and the Oklahoma-Arkansas boundary. The Cherokees, Choctaws, and Chickasaws claim under deeds for vast areas executed by the United States. Oklahoma says that under the equal footing-implied trust doctrine it received title to the beds of navigable streams upon its admission to the Union. The trial court's decision in favor of Oklahoma was made, without an evidentiary hearing, on the pleadings and matters of which it could take judicial notice. No party contends seriously that any evidence is needed or helpful.

The Cherokees sued Oklahoma and the holders of various sand, gravel, oil, and gas leases granted by Oklahoma and covering parts of the land in dispute. The relief sought was an accounting and an injunction. Oklahoma and various of its lessees counterclaimed for a decree quieting title in Oklahoma. The Choctaws and Chickasaws were permitted to intervene and assert their claims of ownership to a portion of the riverbed.[2]

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[1] Sometimes known as the Neosho River and as the Neosho-Grand River.

[2] This is a joint claim. It is undisputed that the Choctaws have an undivided three-fourths interest and the Chickasaws an undivided one-fourth interest. See 11 Stat. 573; 11 Stat. 611; and Chickasaw Nation v. United States, 94 Ct.Cl. 215, 237. Hereinafter reference will be made only to the Choctaws.

All parties agree that the stretch of the Arkansas River with which we are concerned is navigable in fact.[3] From the mouth of the Grand to the confluence with the Canadian, the Arkansas flows through an area granted to the Cherokees. From the mouth of the Canadian to the state boundary, the river divides the lands of the Cherokees, which lie to the north, from the lands of the Choctaws, which lie to the south. The Choctaws claim that their title goes to the north bank of the Arkansas and the Cherokees dispute this. We find it unnecessary to consider this controversy between the Tribes.

The Tribes assert ownership by reason of deeds from the United States covering vast, undivided areas, the perimeters of which were described by metes and bounds. The deeds did not except the beds of navigable streams. The basic argument is that, as a simple matter of conveyancing law, title to all lands within the area vested in the Tribes. An understanding of the situation requires consideration of the circumstances in which the deeds were issued.

At the time of the independence of the United States, the Tribes occupied large areas of land in the South. Westward expansion caused increasing friction between the white settlers and the Indians. Georgia and other later formed states asserted jurisdiction over the Indians and their lands. Intolerable situations arose.[4] The states ignored efforts by the United States to protect and provide for the Indians through treaty and statute. The federal government, faced with growing strife among the

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[3] In Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86, the Supreme Court upheld a lower court finding that the head of navigation on the Arkansas was the mouth of the Grand.

[4] Descriptions of the condition of the Indians are found in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1; Worcester v. Georgia, 31 U.S. (6 Pet.) 515; and Choctaw Nation v. United States, 119 U.S. 1.

Indians and the states, adopted the policy of resettling the Indians on lands to the west which were not then settled by whites.

The Cherokees were first given lands near the White River in what is now the State of Arkansas.[5] Emigration was slow, and new treaties were made, providing for resettlement of all the Cherokees on land west of the Mississippi to be deeded to the Indians by the United States. In turn, the Indians surrendered their lands east of the Mississippi.[6] The Cherokees were then moved to the new lands, but the voluntariness of their migration, and of their consent to the treaties, is doubtful.

The story of the Choctaws in much the same. Relocation of that Tribe from areas east of the Mississippi was made pursuant to the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, and the Treaty of Dancing Rabbit Creek, September 27, 1830, 7 Stat. 333. The Choctaws gave up their lands in the East and received lands in the West.

The relocation of the Indians was made possible by the Louisiana Purchase of 1803,[7] in which the United States obtained the major portion of the western basin of the Mississippi River with the express intent that the inhabitants of the region "shall be incorporated in the Union of the United States."[8] Prior to relocation, however, the Cherokees and Choctaws desired protection from harassment by state and territorial governments. To induce them to move across the Mississippi, the United States

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[5] See Treaty of July 8, 1817, 7 Stat. 156, 158.

[6] See Treaty of May 6, 1828, 7 Stat. 311; Treaty of February 14, 1833, 7 Stat. 414; and Treaty of New Echota, December 29, 1835, 7 Stat. 478.

[7] Treaty of April 30, 1803, 8 Stat. 200.

[8] Id. at 202.

agreed in the Treaty of New Echota and in the Treaty of Dancing Rabbit Creek that no part of the land granted would be included in any state or territory.[9] The patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries.

In the years that followed the situation of the Indians deteriorated.[10] New territories were created in the West and new states admitted into the Union. A number of these states were in regions where Indian treaties provided that no state or territory should be created.[11] The existence of an extensive area which was held by the Indians and in which private property was not recognized was a serious obstacle to the creation of the State of Oklahoma.[12] In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13]

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[9] The Treaty of New Echota provided (Art. 5, 7 Stat. 478, 481) that the lands ceded "shall, in no future time without their [the Indians'] consent, be included within the territorial limits or jurisdiction of any State or Territory." The Treaty of Dancing Rabbit Creek provided (Art. IV, 7 Stat. 333, 334) that "no part of the land granted them [the Indians] shall ever be embraced in any Territory or State."

[10] Stephens v. Cherokee Nation, 174 U.S. 445, 450-460, contains an account of conditions existing in the tribal governments and mentions their corruption and irresponsibility.

[11] See e.g. Treaty with the Senecas and Shawnees of July 20, 1831, 7 Stat. 351, 353; Treaty with the Shawnee of August 8, 1831, 7 Stat. 355, 357; and Treaty with the Ottaway of August 30, 1831, 7 Stat. 359, 361.

[12] Choate v. Trapp, 224 U.S. 665, 667.

[13] 27 Stat. 612, 645.

and the allotment of land to th individual members of the tribes. The result was an agreement with the Cherokees[14] and with the Choctaws[15] which nullified treaties inconsistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. 37, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians.[17]

Oklahoma was admitted into the Union in 1907 upon compliance with the conditions of the Enabling Act[18] which provided that Oklahoma should be so admitted "on an equal footing with the original States,"[19] and on the agreement that it disclaim title to all lands * * * owned or held by any Indian or Indian tribes."[20] By Statute[21] and by court decision[22] Oklahoma has consistently maintained the position that it owns the beds underlying

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[14] 32 Stat. 716, 727.

[15] 32 Stat. 641, 656.

[16] These included the Chickasaws, Creeks, and Seminoles in addition to the Cherokees and the Choctaws.

[17] 34 Stat. at 148.

[18] Act of June 16, 1906, 34 Stat. 267.

[19] Id. at 271.

[20] Id. at 279.

[21] See 64 Okl. St. Ann. § 290; 60 Okl. St. Ann. § 337.

[22] State v. Nolegs, 40 Okl. 479, 139 Pac. 943; Vickery v. Yahola Sand & Gravel Co., 158 Okl. 120, 12 P.2d 881; City of Tulsa v. Commissioners of Land Office, 187 Okl. 82, 101 P.2d 246; and Lynch v. Clements, (Okl.) 263 P.2d 1.

navigable streams. The present suit which questions that ownership was brought by the Cherokees nearly sixty years after statehood.

In Pollard v. Hagan, 44 U.S. (3 How.) 212, 230, the Court held that the Constitution did not pass title of the beds of navigable waters to the United States, but reserved title to the several states. Because new states enter the Union on an equal footing with all other states, title to the beds underlying navigable waters passes to the new states.[23] Shively v. Bowlby, 152 U.S. 1, 48, establishes the power of Congress to grant land below navigable water in a territory when it is necessary "to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce * * *, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The decision in United States v. Holt State Bank, 270 U.S. 49, 55, recognizes the rule stated in Shively v. Bowlby and adds that the United States has refrained from making such dispositions except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."

The parties recognize the principles just stated except that the Indians and those who support them question the applicability of the Holt State Bank decision because of distinguishing facts. Before Minnesota became a state in 1858, the Chippewas ceded to the United States their aborginal right of occupancy with the reservation of an area for continued occupation. Included therein was Mud Lake which the Court found to be navigable water. Later the Indians relinquished the area to the United States. The

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[23] See Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 436, and Weber v. Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65.

issue was whether the United States held title to the land on which Mud Lake was located. The Court held that the lands under the lake were not disposed of by the United States before Minnesota became a state and title passed to Minnesota on admission. Although Holt State Bank was not concerned with a situation, such as we have here, involving a conveyance by the United States to the Indians, that case and the one at bar each relate to the question of whether the United States had disposed of lands underlying navigable waters before statehood. We must follow the admonition in Holt State Bank that such dispositions should not be regarded as intended in the absence of a clear showing of intent.

The United States, as amicus,[24] argues that the equal footing-implied trust doctrine has no application because of the unique character of the Cherokee and Choctaw territory under the treaties and cites Atlantic and Pacific Railroad Company v. Mingus, 165 U.S. 413, as supporting authority. In that case the issue was the validity of an act forfeiting a part of a railroad land grant. A claim of the railroad was that the foreiture failed because the United States had not carried out its part of the bargain to extinguish certain Indian titles. The Court mentioned the Treaties of New Echota and Dancing Rabbit Creek and said that the extinguishment of the Indian title was for determination by Congress or by the executive officers of the federal government, or by voluntary acts of the Indians. Id. at 437-438. The Court quoted with approval the statement in Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, that the Cherokee territory "is not a foreign, but a domestic territory–a Territory which originated under our Constitution and laws."

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[24] The United States disclaims any pecuniary interest in the outcome of the cases and says that it submits its views because of "its nonpecuniary obligations to represent certain Indian interests."

The treaties with the Indians are not in the same category with treaties with independent foreign nations. The Supreme Court early held that that English possessions in America were claimed by right of discovery rather than by right of conquest and that under international law the Indians were regarded as temporary occupiers of the soil which was disposable by the Crown.[25] The title of the Crown passed to the United States and the Indian lands were subject to disposition under the Constitution and laws of the United States. The agreements with the Indians, when ratified by Congress, became statutes of the United States. When grants were made to the Indians, the area granted remained under the jurisdiction of the United States and subject to its Constitution and laws.

In spite of provisions in Indian agreements that no state or territory would be created in certain areas,[26] states were created in the Northwest Territory and in the area covered by the Louisiana Purchase. In the situations before us, the Cherokees and Choctaws agreed to a nullification of the Treaties of New Echota and Dancing Rabbit Creek.[27] Oklahoma was admitted to the Union on an equal footing with the original states. From a practical standpoint, the equal footing principle must be recognized and maintained. There is no place in our federal system for a second-class state.

Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to make such divestiture. Such intent is not definitely declared in the grant. The question is whether

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[25] See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 595, and Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409.

[26] See footnote 11.

[27] See footnotes 14 and 15.

the surrounding circumstances make that intent "very plain."[28]

The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments.

The Indians point out that the ownership of the riverbed is not necessary to the exercise of control over navigation incidental to the authority of the Government under the Commerce Clause. This proves nothing. We are concerned with a property right—not with a navigational right. The recognition in the treaties of the constitutional powers of the United States,[29] if it has any effect at all, negatives intent to convey the riverbed.

Pursuant to their agreements with the United States, the Indians surrendered the areas which they occupied in the South. They reason that because they gave up the beds of navigable rivers, the United States intended that they should have such riverbeds in the areas to which they were removed; and conversely they say that if they do not own the Oklahoma riverbeds, they still own the beds of the navigable rivers in the territory from which they were

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[28] United States v. Holt State Bank, 270 U.S. 49, 55.

[29] See Treaty of New Echota, Art. 5, 7 Stat. 478, 481, and Treaty of Dancing Rabbit Creek, Art. IV, 7 Stat. 333, 334.

removed. The reasoning is unpersuasive. The Indians had an aboriginal title which was subject to the Constitution and laws of the United States. Failure to mention riverbeds does not establish an intent either to retain or relinquish title. If anything, it shows that no party had the problem in mind.

Amici Carter, et al., argue that no contemporary intent of Congress to reserve the riverbeds can be postulated because under the then existing law the concept of navigability was limited to waters affected by the rise and fall of the tides and the Arkansas was not so affected. The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides.[30] The recognition in 1832 by Kent of the English rule[31] preceded any decision by the Supreme Court on the issue and may not be taken as authoritative or persuasive. Reliance on the January 19, 1816, act of the Missouri Territorial Legislature[32] is misplaced because it adopted the common law of England except to the extent that it was not of a "local nature" and "not repugnant to, nor inconsistent with the constitution and laws of the United States." The Supreme Court has said that the ebb and flow of the tide test is not applicable to conditions in the United States. Jones v. Soulard, 65 U.S. (24 How.) 41, deals with the ownership of accretions and is not in point.

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[30] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563, and Barney v. Keokuk, 94 U.S. 324, 336. The reason is that in England all navigable rivers are affected by the tide whereas in the United States that condition is not present.

[31] See Commentaries on American Law by James Kent, 2d ed., Vol. III, p. 427.

[32] The pertinent area was then in the Territory of Missouri.

The application of the navigability principle announced in The Daniel Ball and in Barney v. Keokuk, supra, to the situation presented does not violate any rule of stare decisis. We recognize the importance of stare decisis to decisions affecting property rights.[33] There is no showing that any federal court has ever applied the tidewater rule in determining the ownership of land underlying navigable water and, particularly, there is no factual basis for any claim that the Cherokees or Choctaws ever relied on that rule to their detriment.[34]

United States v. Rands, 389 U.S. 121, is no help to the Indians. That decision recognized the dominant navigational servitude held by the United States and rejected the claim that the United States must pay compensation for land's special value as a port site. It was not concerned with the ownership of a riverbed. It does not overrule Mumford v. Wardell, 73 U.S. (6 Wall.) 423, 436, which says that the soils underlying navigable water "were not granted by the Constitution to the United States, but were reserved to the several States."[35] We find nothing in

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[33] In this regard the amici Carter, et al., rely heavily on the statements in The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 458, that in overruling The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, it was not concerned with property rights. These cases dealt with admiralty jurisdiction and have no pertinence here.

[34] In Shively v. Bowlby, supra, the Court applied the American rule in deciding the ownership of the Columbia River upon Oregon's entrance to the Union in 1859. In the Holt State Bank case, supra, the Court applied the same rule to the ownership of Mud Lake when Minnesota became a state in 1858.

[35] In United States v. Holt State Bank, 270 U.S. 49, 55, the Court said that "the United States early adopted and constantly has adhered to" the implied trust doctrine regarding lands under navigable waters.

the law as it was at the times of the treaties which can be taken as indicative of an intent by the United States to pass title to the riverbed of the Arkansas to the Indians.

The Indians seek comfort from the technical language of the treaties and grants. They attach significance to such phrases as "to the Arkansas River," "down the Arkansas," and "thence down the main channel of the Arkansas." We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments, or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed. Reliance on the surveys is misplaced. The surveyors could not determine the intent of the United States. Donnelly v. United States, 228 U.S. 243, is not in point. Prior to the creation of the reservation there in question, California, by an act of its legislature, had excluded the Klamath River from the navigable class and the Court said that accordingly the river was not navigable in law. Id. at 262-263.

In Moore v. United States, 9 Cir., 157 F.2d 760, cert. denied 330 U.S. 827, and in United States v. Stotts, W.D.Wash., 49 F.2d 619, it was held that lands above low-water mark in tidal areas passed to Indians under treaties with the United States. In each case the court found a definite intent on the part of the United States to retain those lands and waters for the benefit of Indian fisheries and distinguished Holt State Bank, supra, on this ground. In the case before us we have no showing of any need by the Indians for the riverbed of the Arkansas and no expression of intent that it should pass to the Indians.

We recognize that an Indian treaty is to be liberally construed in favor of the Indians[36] as unlettered people

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[36] United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116.

understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection.[37] Another rule of construction is that in a grant by the sovereign nothing passes by implication.[38] Holt State Bank extends this rule to a situation relating to Indian lands and to the equal footing-implied trust doctrine. Although Holt State Bank did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. It requires a clear and definite intent to convey the beds of navigable rivers which otherwise would pass to a state on admission. Such an intent is not shown by the grant of millions of acres of land which are described by perimeters. The responsibility of the United States to the new states is not less than its responsibility to the Indians.

In the final analysis the claim of the Indians rests on inference and implication. Nothing in the treaties, statutes, and conveyances establishes an intent by the United States, as trustee for states to be formed, to convey away property held for the benefit of the new states. When Congress passed the statutes pursuant to the Treaties of New Echota and Dancing Rabbit Creek, the lands covered were undeveloped and virtually unknown. To say that Congress then intended to convey the riverbeds, which over a hundred years later would become valuable because of underlying mineral deposits, is to ignore realities.

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[37] Menominee Tribe of Indians v. United States, 391 U.S. 404, 406. The Treaty of Dancing Rabbit Creek provides, Art. XVIII, 7 Stat. 333, 336, that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

[38] Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 534, and Caldwell v. United States, 250 U.S. 14, 20.

In view of the disposition which we make of the case it is unnecessary to consider the jurisdiction of the court over the claim of the Choctaws against the Cherokees or the validity of that claim.

Affirmed.

Appendix B

Excerpts

TREATY WITH THE WESTERN CHEROKEE MAY 6, 1828
(7 Stat. 311, Vol. II, Kappler, 288)
Proclaimed May 28, 1828

Articles of a Convention, concluded at the City of Washington this sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight, between James Barbour, Secretary of War, being especially authorized therefor by the President of the United States, and the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi, they being duly authorized and empowered by their Nation.

Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, or any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records

of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexion in future; and, Whereas, it being important not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

ARTICLE 1. The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with same line to the River Arkansas, thence in a direct line to the South West corner of Missouri.

ARTICLE 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: Commencing at that point on Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South-West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due West to a point from which a due South course will strike the present North-West corner of Arkansas Territory, thence continuing due South, on and with the present boundary line of the Territory to the main branch of Arkansas River, and thence down said River to its junction with the Canadian

River, and thence up and between the said Rivers Arkansas and Canadian, to a point at which a line running North and South from River to River, will give the aforesaid seven millions of acres. In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of soil extend.

ARTICLE 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * *

ARTICLE 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extend of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessing of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given * * *.

ARTICLE 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neosho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two miles distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

* * *

ARTICLE 11. This Treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Done at the place, and on the day and year above written.

James Barbour	(L.S.)
Black Fox, his x mark,	(L.S.)
Thomas Graves, his x mark,	(L.S.)
George Guess,[a]	(L.S.)
Thomas Maw,[a]	(L.S.)
George Marvis,[a]	(L.S.)
John Looney,[a]	(L.S.)
John Rogers,	(L.S.)
J. W. Flawey, counsellor of Del.	(L.S.)

Chiefs of the delegation

[a] Written by the signers in their language, and in the characters now in use among them, as discovered by George Guess.

Witnesses:

Thos. L. McKenney
James Rogers, interpreter,
D. Kurtz,
H. Miller,
Thomas Murray,
D. Brown, secretary Cherokee delegation,
Pierye Pierya,
E. W. Duval, United States agent, etc.

Ratified with the following proviso:

"Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the 'perpetual outlet west,' provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians; and provided further, That nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes."

DEPARTMENT OF WAR,
31st May, 1828.

TO THE HON. HENRY CLAY,
Secretary of State:

SIR: I have the honor to transmit, herewith, the acceptance of the terms, by the Cherokees, upon which the recent convention with them was ratified. You will have the goodness to cause the same to be attached to the treaty, and published with it.

I have the honor to be, very respectfully, your obedient servant,

SAM'L. L. SOUTHARD.

COUNCIL ROOM, WILLIAMSON'S HOTEL,
Washington, May 31st, 1828.

TO THE SECRETARY OF WAR,
Washington City:

SIR: The undersigned, chiefs of the Cherokee nation, west of the Mississippi, for and in behalf of said nation, hereby agree to, and accept of, the terms upon which the Senate of the United States ratified the convention, concluded at Washington on the sixth day of May, 1828, between the United States and said nation.

In testimony whereof, they hereunto, subscribe their names and affix their seals.

Thomas Graves, his x mark,	(L.S.)
George Maw, his x mark,	(L.S.)
George Guess, his x mark,	(L.S.)
Thomas Marvis, his x mark,	(L.S.)
John Rogers,	(L.S.)

Signed and sealed in the presence of—

E. W. Duval, United States agent, etc.
Thomas Murray,
James Rogers, interpreter.

Appendix C

Excerpts

TREATY WITH THE WESTERN CHEROKEE
FEBRUARY 14, 1833
(7 Stat. 414, Vol. II, Kappler, 385)
Proclaimed April 12, 1834

Articles of agreement and convention made and concluded at Fort Gibson, on the Arkansas river on the fourteenth day of Febraury one thousand eight hundred and thirty-three, by and between Montfort Stokes, Henry L. Ellsworth and John F. Schermerhorn duly appointed Commissioners on the part of the United States and the undersigned Chiefs and Head-men of the Cherokee nation of Indians west of the Mississippi, they being duly authorized and empowered by their nation.

Whereas articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; viz, commencing at a point on Arkansas river, where the eastern Choctaw boundary line strikes said river, and running thence with the western line of Arkansas Territory to the southwest corner of Missouri, and thence with the western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due west, to a point from which a due south course will strike the present northwest corner of Arkansas Territory, thence continuing due south on and with the present

boundary line on the west of said Territory, to the main branch of Arkansas river, thence down said river to its junction with the Canadian, and thence up, and between said rivers Arkansas and Canadian to a point at which a line, running north and south, from river to river, will give the aforesaid seven millions of acres, thus provided for and bounded. The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. And whereas there was to said articles of convention and agreement, the following proviso viz. "Provided nevertheless, that said convention, shall not be so construed, as to extend the northern boundary of said perpetual outlet west, provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty, or treaties, heretofore concluded, between the United States and the Creek tribe of Indians—and provided further, that nothing in said convention, shall be construed, to cede, or assign, to the Cherokees any lands heretofore ceded, or assigned, to any tribe, or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes." —And whereas, it appears from the Creek treaty, made with the United States, by the Creek nation, dated twenty-fourth day of January eighteen hundred and twenty-six, at the city of Washington; that they had the right to select, and did select, a part of the country described within the boundaries mentioned above in said Cherokee articles of agreement—and whereas, both the Cherokee and Creek nations of Indians west of the Mississippi, anxious to have their boundaries settled in an

amicable manner, have met each other in council, and, after full deliberation mutually agreed upon the boundary lines between them—Now, therefore, the United States on one part, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi on the other part agree as follows:

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the Territorial line crosses Arkansas river—thence running from said north point, south, on the said Territorial line to the place where said Territorial line crosses the Verdigris river—thence down said Verdigris river, to the Arkansas, thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river at its junction with the Arkansas—thence running south, forty-four degrees west, one mile—thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian—thence along the said four miles lines to the Canadian—thence down the Canadian to the Arkansas—thence, down the Arkansas, to that point on the Arkansas, where the eastern Choctaw boundary strikes, said river; and running thence with the western line of Arkansas Territory as now defined, to the south-west corner of Missouri—thence along the western Missouri line, to the land assigned the Senecas; thence, on the south line of the Senecas to Grand river; thence, up said Grand river, as far as the south line of the Osage reservation, extended if necessary—thence up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described

boundaries. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended–Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees–and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

ARTICLE II. The Cherokee nation hereby relinquishes and quit claim to the United States all the right interest and title which the Cherokees have, or claim to have and to all the land ceded, or claimed to have been ceded to said Cherokee nation by said treaty of sixth of May one thousand eight hundred and twenty-eight, and not embraced within the limits or boundaries fixed in this present supplementary treaty or articles of convention and agreement.

ARTICLE III. The Cherokee nation, having particularly requested the United States to annul and cancel the sixth article of said treaty of sixth May, one thousand eight hundred and twenty-eight, the United States, agree to cancel the same, and the same is hereby annulled–Said sixth article referred to, is in the following words–"It is moreover agreed by the United States, when the Cherokees may desire it, to give them a plain set of laws, suited to their condition–also when they may wish to lay off their lands and own them individually, a surveyor shall be sent to survey them at the expense of the United States.

* * *

ARTICLE V. These articles of agreement and convention are to be considered supplementary, to the treaty before mentioned between the United States, and the Cherokee nation west of the Mississippi dated sixth of May one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty, any further, than said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention or agreement.

ARTICLE VI. It is further agreed by the Cherokee nation, that one mile square shall be reserved and set apart from the lands hereby guaranteed, for the accommodation of the Cherokee agency; and the location of the same shall be designated by the Cherokee nation, in conjunction with the agent of the Government of the United States.

ARTICLE VII. This treaty, or articles of convention, after the same have been ratified, by the President and Senate shall be obligatory on the United States and said Cherokee nation.

In testimony whereof, the said Montfort Stokes, Henry L. Ellsworth, and John F. Schermerhorn, commissioners as aforesaid and the chiefs and head men of the Cherokee nation aforesaid, have hereunto set their hands, at Fort Gibson on the Arkansas river, on the 14th day of February, one thousand eight hundred and thirty-three.

Montfort Stokes,
Henry L. Ellsworth,
J. F. Schermerhorn,
John Jolly, his x mark,
Black Coat, his x mark,

Walter Webber,
Principal Chiefs:
John Rogers, president commissioners,
Glass, president council.

SIGNED, sealed, and delivered in our presence:

S. C. Stambaugh, secretary commissioners,
M. Arbuckle, colonel Seventh Infantry,
Geo. Vashon, agent Cherokees west,
Jno. Campbell, agent Creeks.
Alexander Brown, his x mark,
Jno. Hambly,
Interpreters,

William Nesbitt,
Peter A. Cams,
N. Young, major U.S. Army
W. Seawell, lieutenant Seventh Infantry,
Wm. Thomton, clerk committee
Charles Webber, clerk council.

Appendix D

Excerpts

TREATY WITH THE CHEROKEE, DECEMBER 29, 1835.
(7 Stat. 478, Vol. II, Kappler, 439)
Proclaimed May 23, 1836.

Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.

Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the Government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the Senate of the United States themselves and

to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge, Elias Boudinot, Archilla Smith, S. W. Bell, John West, Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United States which were to be submitted to their nation for their final action and determination:

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioners then present, *at that place or elsewhere* and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington City, with a view to close negotiations there, as stated by them notwithstanding they

were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was made it must be done here in the nation, where the delegation at Washington last winter *urged that it should be done for the purpose of promoting peace and harmony among the people;* and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious, uncertain, and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in couniel [sic] according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Decr. 1835.

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles, but as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoliations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoliations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said

territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied [sic]."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby convenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a prorata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agrees that the lands above ceded by the treaty of Feb. 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free

use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by

order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers, mechanics, and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7. The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

* * *

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

* * *

ARTICLE 19. This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20. (Supplemental article. Stricken out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

William Carroll,
J. F. Schermerhorn.

Major Ridge, his x mark	(L.S.)	Te-gah-e-ske, his x mark	(L.S.)
James Foster, his x mark,	(L.S.)	Robert Rogers,	(L.S.)
Tesa-ta-esky, his x mark	(L.S.)	John Gunter,	(L.S.)
Charles Moore, his x mark,	(L.S.)	John A. Bell,	(L.S.)
George Chambers, his x mark,	(L.S.)	Charles F. Foreman,	(L.S.)
Tah-yeske, his x mark,	(L.S.)	William Rogers,	(L.S.)
Archilla Smith, his x mark,	(L.S.)	George W. Adair,	(L.S.)
Andrew Ross,	(L.S.)	Elias Boudinot,	(L.S.)
William Lassley,	(L.S.)	James Starr, his x mark	(L.S.)
Cae-te-hee, his x mark,	(L.S.)	Jesse Half-breed, his x mark,	(L.S.)

Signed and sealed in the presence of–

Western B. Thomas, secretary.
Ben F. Currey, special agent.
M. Wolfe Batman, first lieutenant, six U.S. Infantry, disbursing agent.
Jon L. Hooper, lieutenant, fourth Infantry.
C. M. Hitchcock, M.D. assistant surgeon U.S.A.
G. W. Currey,
William H. Underwood,
Comellius D. Terhune,
John W. H. Underwood.

In compliance with instruction of the council at New Echota, we sign this treaty.

Stand Watie,
John Ridge.

March 1, 1836
Witnesses:

Elbert Herring,
Alexander H. Everett,
John Robb,
D. Kurtz,
Wm. Y. Hansell,
Samuel J. Potts,
Jno. Litle,
S. Rockwell.

* * *

Appendix E

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians * * it was stipulated and agreed on the part of the United States, * * the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are * * in the words following, that is to say:–

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, * * the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians, * * SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits * * the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS, * * hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the north-east corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; * *

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fouteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty. * *

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall me made."–

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the south-west corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and

forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.–

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof * *

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain

on the western prairie, referred to in the second acticle of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.–

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President M. VAN BUREN
M. M. GARLAND
Recorder of the General Land Office

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 976

THE CHOCTAW NATION AND THE CHICKASAW NATION, PETITIONERS

v.

STATE OF OKLAHOMA, ET AL.

No. 1104

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in support of the petitions filed by the Indian tribes in these cases. What is at stake is the ownership of the bed of the navigable portion of the Arkansas River in Oklahoma, claimed by the State as an incident of statehood under the "equal footing" doctrine of *Pollard* v. *Hagan*, 3 How.

335-451—69

212, and by the Indian tribes as part of prior treaty grants from the United States. The issue has practical importance because the mineral value of the riverbed is substantial and because the decision in this case may well control other similiar controversies. What is more, the ruling below—wholly rejecting the claim of the Indians—implicates solemn promises made by the United States to tribes who have special claims on the government's protection. For these reasons, and because prior decisions of this Court are invoked as dispositive, we believe the case is appropriately brought here.

1. By a series of treaties in the early nineteenth century, the United States ceded very large tracts in what is today Oklahoma to the Choctaw and Chickasaw Nations (jointly) and to the Cherokee Nation. Taken together, these grants include all the lands riparian to the navigable portion of the Arkansas River in Oklahoma, a portion of the river being entirely within the Cherokee reservation, and another segment of the river being the boundary line between the two grants. The Cherokees claim the whole of the riverbed where it is surrounded by their lands, and half of the bed—to the "thread"—where the river is the boundary between themselves and the lands of Choctaws and Chickasaws. These latter tribes—whose grant is earlier—claim the entire bed of the boundary river.[1] These claims are based on treaty provisions—

[1] We express no view on the conflicting claims of the tribes to the south half of the bed of the Arkansas River where it is the boundary between the grants. Neither petition appears to present that dispute for adjudication here, and it seems, at all events, premature, the courts below not having considered it.

notably the Treaty of Dancing Rabbit Creek (September 27, 1830, 7 Stat. 333) in the case of the Choctaw and Chickasaw Nations, and the Treaty of New Echota (December 29, 1835, 7 Stat. 478) in the case of the Cherokees—by which the United States ceded to the tribes "in fee simple" huge tracts described only by exterior boundaries and specifically assuring that the lands would never be embraced within any State or Territory.

Notwithstanding the unqualified language of the grants and the pledge that the lands would never be included in any State, the court of appeals concluded that the United States intended to reserve title to the riverbed circumscribed by the grants, to be held in trust for future States, so that such future States would enter the Union on an "equal footing" with their sister States which acquired ownership of the beds of navigable rivers on statehood. The State of Oklahoma, the court held in reliance on this doctrine, received title to the bed of the Arkansas River when it was admitted to the Union and thus could control the exploitation of subsurface mineral rights.

The court below relied on this Court's decision in *United States* v. *Holt State Bank,* 270 U.S. 49, as standing for the proposition that under the "equal footing" doctrine the lands under navigable rivers were reserved for future States unless the United

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Our submission is merely that the riverbed cannot be supposed to have been reserved to the United States when the lands on either side were granted in perpetuity to Indian tribes. We note that there can be no conflicting claims, as between the tribes, to that portion of the river which is entirely encompassed by the grant to the Cherokee Nation.

States made explicit statements to the contrary in granting surrounding territory. We disagree. If these had been private conveyances, there could be no question that a strip of land underlying a navigable river meandering through the blocks of land granted would be embraced in the grants. This is simply common sense, since such retained strips would be useless and their reservation purposeless. The fact that these were grants by the government, which the court below deemed critical, should not lead to an unnatural and unwarranted restriction on their plain meaning. In the 1830's, when these grants were made, there was certainly no purpose for the United States to retain ownership of such isolated strips through land we promised never to include in any State. See, *e.g., Atlantic and Pacific Railroad* v. *Mingus,* 165 U.S. 413, 435–436.

Nor does the *Holt State Bank* decision, *supra,* justify rejection of this obvious meaning of the grants. Indeed, that case recognized that "equal footing" is not an absolute prohibition against federal conveyance of riverbed lands prior to statehood. It simply held that such disposals "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain" (*id.* at 55). The present cases involve the antithesis of almost every circumstance which was held in *Holt State Bank* to controvert a grant of the lakebed. In that case the government had merely established a reservation for the Indians in return for their cession of their aboriginal right of occupancy of the surrounding lands, while here the United States affirmatively con-

veyed title to the Cherokees, Choctaws, and Chickasaws in fee simple. The grants involved in the present case did not involve (as in *Holt State Bank*) important national and international waterways being used at the time by non-Indian settlers and travelers. The treaties in these cases concerned rivers wholly within the blocks granted, and one of the principal purposes of the outright grants to the tribes was to exclude white men from the use of the area, including the rivers.[2] And in *Holt State Bank,* the pertinent treaties were entered into barely three years before the admission of Minnesota to the Union, whereas the treaties in the present cases pledged that the granted lands would never be included within any State. In light of these critical differences, we believe the 1830 and 1835 treaties sufficiently manifested the government's intention to transfer title to the riverbed, not to retain it in trust for a hypothetical State that at the time the parties believed would never come into existence.[3]

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[2] Although the treaties specifically adverted to Congressional regulation of commerce with the Indians and travel through their territory by white citizens, permission from the tribes was apparently contemplated as a pre-condition to such travel or residence in the area by non-Indians. See, *e.g.*, Arts. 5 and 6, Treaty of New Echota, December 29, 1835 (Cherokee Pet. App. D-7—D-8).

[3] Compare *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 86, where the Court held that adjacent underwater lands were reserved under a statute setting apart "the body of lands known as Annette Island" as an Indian reservation. In *Moore* v. *United States*, 157 F. 2d 760, certiorari denied, 330 U.S. 827, the Ninth Circuit followed this Court's approach and held that an Executive Order reserving lands for the Quileute Indians by government survey lot and section descriptions included adjoining underwater lands. We think these cases express the rule that should be followed and that the present decision cannot be reconciled with them.

2. In our view, the issue presented is sufficiently important to merit final resolution by this Court. Directly involved are substantial interests of the petitioner tribes. In addition, as the court of appeals itself recognized, similar provisions are to be found in treaties with other Indian tribes (Cherokee Pet. App. A–6, n. 11). While the extent to which this similarity will lead to litigation cannot be predicted with any certainty, we believe the present cases pose an appropriate opportunity for the Court to determine the degree of specificity required to make a showing that the government intended to transfer riverbeds to Indians rather than to reserve them in trust for a State whose potential creation was disavowed. Lastly, we point out, the impact of the "implied trust"—"equal footing" doctrine also extends to problems arising from Alaskan Statehood,[4] and a decision by this Court

[4] *E.g.*, the United States withdrew two million acres of land and water in Alaska to form the Kenai Moose Range for the protection of the wildlife in that area. See *Udall* v. *Tallman*, 380 U.S. 1. A district court has nevertheless held that under the "equal footing" doctrine Alaska received title to the lands under navigable waters within the Range when it became a State. *United States* v. *State of Alaska et al.* (Civ. No. A–152–67, D. Alaska). The United States has noted an appeal to the Ninth Circuit.

in the instant cases could measurably advance resolution of such conflicting claims.

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted.

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In the
Supreme Court of the United States
OCTOBER TERM, 1968

Nos. 976 and 1104

THE CHOCTAW NATION AND THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION OF THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, AND TO PETITION OF THE CHOCTAW NATION AND THE CHICKASAW NATION

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 402 F.2d 739. A copy of the orders of the District Court for the Eastern District of Oklahoma and of its judgment are included as Appendices A, B, and C.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

CONSOLIDATION OF BRIEF IN OPPOSITION

This was one case in the District Court and treated as one case in the Court of Appeals. Respondents file a consolidated brief in opposition to the petitions filed by both The Cherokee Nation or Tribe of Indians in Oklahoma (designated hereinafter sometimes as "the Cherokees") and The Choctaw Nation and The Chickasaw Nation (designated hereinafter sometimes as "the Choctaws") all of said petitioning parties also being designated hereinafter sometimes as "Petitioners." The purpose of consolidation is to avoid needless repetition, for though the Cherokee claims and the Choctaw claims are based on different treaties and patents, the legal principles in the interpretation thereof are the same. On this basis Respondents filed a consolidated brief in the District Court and in the Court of Appeals.

QUESTION PRESENTED

Respondents controvert the statement of the Questions Presented in the Petition of the Cherokees and the statement of the Questions Presented in the Petition of the Choctaws, on the ground that each of those statements ignores the real question which Respondents submit is this:

> In the treaties with the Cherokees and the Choctaws, and in the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the Arkansas River in Oklahoma below its confluence with the Grand River to the Cherokees or the Choctaws?

STATEMENT OF THE CASE

This is an action to quiet title and for an accounting. It was filed in December, 1966 by the Cherokees against Respondents. The Choctaws intervened. No suit involving this subject matter had been filed before that time by either. The Cherokees and the Choctaws asserted conflicting claims. Respondents, the State of Oklahoma and its lessees, filed answers and cross-petitions to quiet title against the Cherokees and the Choctaws.

The subject matter of the litigation is certain land in Oklahoma consisting of the bed of the Arkansas River from its confluence with the Grand River to the Oklahoma-Arkansas state line. The navigability of this stretch of the river was not disputed in the Court of Appeals.

The Cherokees claim under certain treaties with the United States contained in the Statutes at Large and under a patent. The Choctaws also claim under certain treaties with the United States contained in the Statutes at Large and under a patent.

Oklahoma claims the bed of this navigable stream by virtue of its sovereignty and admission to the Union on an equal footing with the original states and has asserted its ownership actively since statehood on November 16, 1907.

The District Court and the Court of Appeals construed the treaties and patents and held that they did not provide for conveyance of the river bed to either of Petitioners and that title is vested in the State. In view of this holding, neither court expressed any opinion on the conflicting claims of Petitioners.

SUMMARY OF ARGUMENT

I. This case has a narrow scope and is of no general public interest or importance. The facts are unique and do not apply to any other land. No conflict among courts of appeal is involved here, nor is there any dispute about the general principles of law which are controlling. At issue is only the application of these principles to a limited and particular fact situation which can only concern these litigants.

II. Petitioners' construction of the legal status of the treaties and the tribes is incorrect.

III. No reasonable interpretation of these treaties, which have only the force and effect of statutes, or of these patents would permit the inclusion of the river bed in the grants to Petitioners.

IV. The courts below reasonably and properly held that the treaties and the patents did not provide for conveyance of the land in dispute to Petitioners or either of them.

V. The facts and holding in *Holt State Bank* have been misunderstood and misconstrued by Petitioners and by Amicus Curiae. The Court of Appeals was correct in construing and applying *Holt State Bank*.

VI. The United States always retained the intention, the right, and the power to include the lands conveyed to Petitioners in a future state, either through agreement with Petitioners or otherwise.

VII. Comments on Memorandum of United States as Amicus Curiae.

ARGUMENT

I

THIS CASE HAS A NARROW SCOPE AND IS OF NO GENERAL INTEREST OR PUBLIC IMPORTANCE. THE FACTS ARE UNIQUE AND DO NOT APPLY TO ANY OTHER LAND. NO CONFLICT AMONG COURTS OF APPEAL IS INVOLVED HERE, NOR IS THERE ANY DISPUTE ABOUT THE GENERAL PRINCIPLES OF LAW WHICH ARE CONTROLLING. AT ISSUE IS ONLY THE APPLICATION OF THESE PRINCIPLES TO A LIMITED AND PARTICULAR FACT SITUATION WHICH CAN ONLY CONCERN THESE LITIGANTS.

The subject matter of the case is a narrow strip of land in eastern Oklahoma. The facts involved in the case are unique and do not involve any other land anywhere else. The State of Oklahoma is litigating in effect with two organizations of certain citizens of that State to determine who owns this strip of land (the members of the Cherokee tribe and of the Choctaw and the Chickasaw tribes predominately are citizens of the State and have been so since statehood). The treaties (which as we will point out later have the status of statutes) and the patents were studied and construed by two able courts below and each court found that they did not provide for the conveyance of the river bed to either of the Petitioners. The treaties (statutes) and patents in question do not apply to or relate to any other land in the United States other than the strip of land in eastern Oklahoma known as the bed of the Arkansas River in the area involved in this suit. The courts below found that references to the river contained in the treaties and patents were for the purpose of fixing boundaries, monuments or reference points and were not for the

purpose of conveying the entire river bed. This was a reasonable and proper construction. And this being a reasonable and proper construction, what purpose can be served by submitting the same treaties (statutes) and patents to another court for construction? Respondents submit that no reason exists for review of the lower court's opinion on certiorari.

The extraordinary writ of certiorari may not be invoked in lieu of appeal. *Hartford Acc. & Indem. Co. to Use of Silva* v. *Interstate Equipment Corp.*, 176 F.2d 419 (3d Cir. 1949), *cert. den.* 338 U.S. 899, 94 L.Ed. 553; 28 U.S.C.A. Sec. 1651. Although, as stated in Rule 19(1) of the Supreme Court Rules, its issuance is not a matter of right, but of sound judicial discretion, ". . . [the writ] will be granted only where there are special and important reasons therefor." It is submitted that no such reasons here exist.

Petitioners seek review of a decision of a court of appeals, concerning which subsection (b) of Rule 19 lists the grounds for exercise of this Court's discretion in all but the most exceptional cases.

First, this Court will issue a writ where ". . . a court of appeals has rendered a decision in conflict with another court of appeals on the same matter." No conflict among circuits exists here, nor could any exist. The treaties at issue in this case, The Treaty of New Echota of December 29, 1835 between the United States and the Cherokee Nation, 7 Stat. L. 478, and the Treaty of Dancing Rabbit Creek of September 27, 1830 between the United States and the Choctaw Nation, 7 Stat. L. 333, provided for

the removal of the Nations concerned to lands lying entirely within what is now the State of Oklahoma, and the river bed at issue here lies entirely within such Oklahoma lands. No other court of appeals has ever construed or will ever construe these treaties with respect to these lands, nor will other courts of appeal ever construe similar treaties, for New Echota and Dancing Rabbit were specifically, exclusively and peculiarly limited to the removal of these Civilized Tribes, the Cherokees and the Choctaws (and Chickasaws), from the South to Oklahoma.

Second, a writ may issue where a court of appeals ". . . has decided an important state or territorial question in a way in conflict with applicable state or territorial law." Here, on the contrary, the decision of the Court of Appeals squarely affirms state law on the precise question at issue here, as expressed by the Oklahoma Supreme Court in 1932, in *Vickery* v. *Yahola Sand & Gravel Co.*, 12 P.2d 881, discussed in Section IV of this brief; and affirms also the action of the executive branch of the Oklahoma State government in its exercise of active dominion over the lands here in controversy since statehood in 1907.

Third, a writ will issue where a court of appeals ". . . has decided an important question of federal law which has not been, but should be settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court." Here, it is submitted, the questions of federal law involved are the existence of the "doctrine of equal footing" stated by this Court in 1845 in *Pollard* v. *Hagan*, 3 How. 212, 11 L.Ed. 565, and unchallenged since; and the rule of construction which governs the interpretation of purported grants by the United States

of lands beneath navigable waters which otherwise would be held in trust for future states under the doctrine of equal footing, set forth most pertinently here by this Court in 1925 in *United States of America* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465. Neither the doctrine of equal footing nor the *Holt State Bank* rule of construction are questioned by Petitioners here, who challenge only their application to a unique fact situation which concerns only these particular Indians, arising out of only their particular treaties, and having application only to the ownership of a narrow strip of river bed in Eastern Oklahoma.

That there is no error of law apparent on the record, nor any misapplication of opinions of this Court by the courts below in this cause, will be demonstrated in Sections II-VII of this brief.

Fourth, a writ may issue under the standards of Rule 19(b) where a court of appeals ". . . has so far departed from the acceptable and usual course of judicial procedures, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." No contention is made by Petitioners here of any such departure, or of any jurisdictional or procedural irregularity or even of any abuse of discretion by either court below. Petitioners have had their full and fair days in court, and now complain only of the results.

In addition to the reasons set forth in Rule 19(b), certiorari has been granted where important constitutional questions are presented, or where international relations may be affected. Neither of these grounds is applicable here.

Finally, it is said that a writ of certiorari should be exercised sparingly, and should only issue in cases of peculiar gravity and general importance. *Ex parte Lau Ow Bew*, 141 U.S. 583, 35 L.Ed. 868 (1891). For this reason, perhaps more than any other, Respondents submit that certiorari here is inappropriate, for this case is of utterly no general public importance. It affects only a narrow strip of land in eastern Oklahoma, and only these litigants and those claiming under them. It can involve no other river bed even in Oklahoma, for among Oklahoma rivers only the Arkansas is navigable and its entire navigable portion is at issue in this case. The treaty interpretations required here can affect lands in no other state, nor any other citizens. In reality, this case represents only a quiet title suit between the State of Oklahoma and certain of its own citizens, for the resident members of the Cherokee, Choctaw and Chickasaw tribes have all been citizens of the State of Oklahoma since statehood.

II

PETITIONERS' CONSTRUCTION OF THE LEGAL STATUS OF THE TREATIES AND THE TRIBES IS INCORRECT.

Respondents submit that throughout the petitions filed by the Cherokees and by the Choctaws and the memorandum for the United States as *amicus curiae* there are certain fundamental fallacies as to the status of the "treaties" as obligations of the United States, and as to the status of the Cherokees and the Choctaws as autonomous political bodies.

First, the treaties invoked are not contracts and confer no vested rights. "Such treaties are not contracts and con-

fer no vested rights upon the tribes which are within the protection of the Constitution. They are effective not as treaties, but as acts of Congress and do not impair the power of Congress to further legislate on the same subject matter, even in violation of the terms of the treaties." Chapter 2 of Mills, Oklahoma Indian Land Laws, Thomas Law Book Co., 2d Ed., 1924. Respondents include as Appendix D a copy of chapter 2 of this highly respected authority which places a suitable perspective on the legal status of the treaties cited by Petitioners.

Second, neither the Cherokees nor the Choctaws have full legal autonomy and their status has a most limited and restricted nature.

In the opinion below[1] the court summarized the present status of the Indian Tribes involved, pointing out that the Choctaws[2] and the Cherokees[3] entered into agreements with the United States providing for the extinguishment of tribal titles to land, nullifying treaties inconsistent therewith, and providing for the allotment of lands. The opinion further points out that the Act of April 26, 1906, 34 Stat. L. 137, provided for the final disposition of the affairs of the Five Civilized Tribes, including the Choctaws and the Cherokees.

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[1] 402 F.2d 739.

[2] Act of July 1, 1902. Agreement between the United States and the Choctaws and Chickasaws, 32 Stat. L. 641.

[3] Act of July 1, 1902. An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes, 32 Stat. L. 716, was the subject of a special election by the Cherokees and resulted in Cherokee ratification on August 7, 1902.

The Choctaw-Chickasaw Agreement and The Cherokee Agreement both provided for expiration of tribal governments on March 4, 1906, incident to the enrollment, allotment, and granting of U. S. citizenship to the members of the tribes, which events were intended to dissolve such sovereignty as the nations possessed. However, this dissolution was forestalled by "Joint Resolution Extending the Tribal Existence and Government of the Five Civilized Tribes of Indians in the Indian Territory," Act of Congress, approved March 2, 1906, 34 Stat. L. 822 which provided:

> "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

Hence, although the United States assumed primary administration of tribal affairs, which administration has been and is continuing by successive Acts of Congress, the tribes are now maintaining only an empty shell of *de jure* government asserting and collecting claims under special legislation and instituting actions seeking recovery of purported tribal lands, and other similar activities. Here, purely in this "winding up" process Petitioners (who now only through sheer technicality still are referred to as "Nations") now seek for the first time to assert title to

lands over which the State of Oklahoma has exercised active dominion consistently for more than sixty years, since statehood in 1907.

In this connection, all residents of Choctaw and Cherokee extraction exercise the rights and privileges of citizenship. The "blanket" status often attributed to reservation Indians has no application to the Cherokee or Choctaw or Chickasaw Indians in Oklahoma. Since 1907, they have conducted their own personal affairs; they are educators, lawyers, doctors, secretaries, clerks, carpenters, brick masons, engineers, airplane pilots, painters, poets, musicians, and so on. Many thousands of Oklahomans are proud of their Indian heritage but certainly would resent the implication that they have any citizenship other than in the United States and the State of Oklahoma.

Further, if the rule followed by the Court of Appeals in *United States* v. *Magnolia Petroleum Company*, 110 F.2d 212 (10th Cir. 1939), dealing with strips and gores caused by abandoned railroad grants, is applied to riparian allotments made by Petitioners, the allottees of Petitioners or their successors in interest, many of whom are non-Indians, and not Petitioners themselves, would benefit from a reversal of this case. Representatives of certain non-Indians appeared as *amicus curiae* in the District Court and the Court of Appeals in pursuit of such claims.

III

NO REASONABLE INTERPRETATION OF THESE TREATIES (WHICH HAVE ONLY THE FORCE AND EFFECT OF STATUTES) OR OF THESE PATENTS WOULD PERMIT THE INCLUSION OF THE RIVER BED IN THE GRANT TO PETITIONERS.

The District Court took judicial notice (not challenged by Petitioners) ". . . that from at least as early as 1824 until sometime after November 16, 1907 the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year." This fact of navigability must be considered in reading the treaties with the Cherokees attached to their petition and the treaties with the Choctaws mentioned in their petition. In the Cherokee treaties mention is made of other Indian tribes in the area—The Creeks—The Osages—The Quapaws, and other tribes. Fort Gibson, a substantial army post, had been established at the head of the navigable waters in controversy in 1824. The District Court concluded ". . . *this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation and at the time the treaties were made pursuant to which the lands were ceded.*" The rights of the Creeks, the Osages, and other Indian tribes to use the river, the rights of the United States government and of the people generally to use the river were preserved by keeping the river bed in public hands—the United States—and later the State of Oklahoma.

What have Petitioners to offer to show this public highway of commerce was conveyed to them? Mere references to the Arkansas River—obviously as a boundary, a monument or a reference point. There is no language in any treaty or patent that can be read to include the entire river bed. We find references to "commencing at that point on Arkansas River," "to the main branch of Arkansas River," "down said river," "thence up the Arkansas," "to the Arkansas River" and like expressions in the treaties and patents, but no language that would include the bed of a river then known to be and recognized to be a navigable stream. The burden of proving the inclusion of the river bed under the treaties or patents lies on Petitioners—and in this they have failed. The argument of Petitioners rests on inferences—not on the definite expressions required in conveyancing.

As the courts below both found, no reasonable construction, *using ordinary standards of interpretation*, would permit the inclusion of the river bed under the language that was used in the treaties and patents.

IV

THE COURTS BELOW REASONABLY AND PROPERLY HELD THAT THE TREATIES AND THE PATENTS DID NOT PROVIDE FOR CONVEYANCE OF THE LAND IN DISPUTE TO PETITIONERS OR EITHER OF THEM.

The respective petitions filed herein present an interesting, voluminous and irrelevant mass of historical data. However, assuming some relevancy for the sake of argument, the facts are not as one-sided as Petitioners would have the Court believe, and there were strong differences

in opinion among the leading members of the Indian Tribes involved, some of them favoring the actions which eventually were taken by the Federal government, and some opposing. Respondents could marshal before this Court a great amount of historical data that would show the viewpoint of the members of the leading factions who favored removal and who understood and expected statehood to follow. The United States never abandoned the intention eventually of including all whites and Indians who moved westward as citizens in one or more states. That was the original purpose adopted for the western lands acquired in the Louisiana Purchase and the consistent pattern of the developing country.

Notwithstanding all of the lengthy accounts of bureaucratic, tribal and other governmental discussions and proceedings contained in the petitions, in the last analysis we *must look to see what the parties actually did.* We must look to the treaties themselves and to the patent and see just what was said in them. *In the judgment of the courts below there was no ambiguity on the subject in controversy in this case. The treaties and the patents clearly did not provide for conveyance of the bed of the river in litigation here to either the Cherokees or the Choctaws. That being true, no reservation of the river bed was necessary for the United States to retain it.*

Ownership of this river bed had been asserted by Oklahoma for nearly sixty years prior to the filing of this suit through the extraction of untold tons of sand and gravel by its lessees and permittees and through the granting of oil and gas leases.

The Department of the Interior concurred in Oklahoma's assertion of title. In a letter dated March 26, 1908[4] from Acting Commissioner of Indian Affairs, C. F. Larrabee, to the Secretary of the Interior, we find the following statement:

> " 'In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, it did not convey the ownership of the beds of navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall. Thus the State of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas River, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 16, 1907. Very respectfully,
>
> " '[Signed] C. F. Larrabee, Acting Commissioner.
>
> " 'March 27, 1908:
>
> " 'Approved: [Signed] Jesse E. Wilson, Secretary' "

The foregoing letter is of extreme importance here as direct evidence of long continued executive interpretation expressly placed upon the treaties involved in this litigation by the Department of the Interior, which is charged with their administration. Such long continued administrative construction has been held to have the effect of law. *Helvering* v. *Winmill,* 305 U.S. 79, 83 L.Ed. 52 (1938). It is always entitled to great weight by the courts faced with the task of construing the same treaties (statutes) and should not be overturned without cogent reasons. *Zemel*

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[4] Quoted by the Supreme Court of Oklahoma in *State* v. *Nolegs,* 139 Pac. 943, 945 (1914).

v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179 (1965). See also the many authorities collected in 82 C.J.S. "Statutes," Sec. 359. This is especially true where such construction has been made by the highest officers in the executive department concerned, *Petition of Finance Committee of Legislature of Virgin Islands*, 242 F.2d 902 (C.A. Virgin Is. 1957), and here note that the foregoing letter was expressly approved by the Secretary of the Interior on March 27, 1908.

No change has been made by the Department of the Interior in its 1908 interpretation; nor was this interpretation challenged by the Petitioners until December, 1966 when they asserted their claims in court for the first time. Moreover, both the Department and Petitioners were silent when a certain Cherokee tribal member litigated the same issue through the Oklahoma Supreme Court in 1932. The same arguments presented here were decided adversely to the Cherokee allottee. In the case of *Vickery* v. *Yahola Sand & Gravel Co.*, Vickery, a Cherokee, held a Cherokee allotment abutting upon the Arkansas River a short distance below its confluence with the Grand River. He sued Yahola Sand & Gravel Co. to recover for sand and gravel it had removed from the river bed opposite Vickery's allotment. The trial court found for the defendant and on appeal to the Oklahoma Supreme Court the State intervened and filed a brief. The Court considered the pertinent treaties with the Cherokees, and furthermore considered whether it had been necessary for the United States to convey the bed of this navigable stream to the Cherokees in order "to carry out other public purposes appropriate to the objects of which the United States held the territory." *This is precisely the proposition argued by the Cherokees*

and the principle argued by the Choctaws. In holding in favor of the defendant and the state and against Vickery, the Cherokee allottee, the Court's opinion applied against the tribal claims as well as against the allottee when it said:

> "Considering the several Cherokee treaties, acts of Congress, and conveyances in the light of the times and circumstances in which they were made, and giving full force to the rule of interpretation set forth in the opinions of the Circuit Court of Appeals in the *Brewer-Elliott* case, *supra, nothing appears that would make it necessary to convey the bed of the navigable stream to the Cherokee Tribe in order to carry out any public purposes appropriate to the objects for which the United States held the territory embracing the lands granted.* The territory embracing the lands was a part of the Louisiana Purchase. The declared purpose of the Louisiana Purchase Treaty with France was that statehood should be ultimately conferred upon the inhabitants of the territory purchased, though this purpose was in a measure departed from in the treaties, in that by article 5, of the Treaty of New Echota (7 Stat. L. 481), it was provided: 'Article 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.' But ultimately the purpose, as originally declared, has been accomplished.
>
> "The only other purpose appropriate to the objects for which the United States held the land that has been suggested was to provide a permanent home for the several Indian Tribes.
>
> "[5, 6] We see nothing in the treaties or acts of Congress, considering the times and circumstances in which they were made, and the relation between the

contracting parties, that would render it necessary to convey the title to the bed of navigable rivers within the lands granted to the Cherokees in order to carry out the purpose of providing a permanent home for the tribe.

"On the other hand, it would appear to the best interests of the tribe in full enjoyment and possession of the home thus provided that the navigable rivers within the lands should be and remain public highways. The Cherokee Indians were not then extensively engaged in commerce but rather an agricultural people. Aside from marketing their agricultural products, their trade and commerce consisted largely of barter and trade between themselves and with certain designated and licensed traders permitted to trade within their country. It was highly necessary at that time, for the benefit of the Cherokees as well as other Indian tribes located on adjacent lands that the navigation of the Arkansas river, as far up its course as the same was navigable, be kept open and free, and for this purpose it would appear far better that the title to the bed of the stream, where navigable, be kept and held in the United States, for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the land so granted to them.

"This would be in accord with the general policy of the United States and the theory upon which the Congress of the United States has constantly acted in disposing of the public lands, stated in *Shively* v. *Bowlby*, *supra*, as follows: 'The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or

above the ebb and the flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless, in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.'

"We are, therefore, of the opinion that neither by express terms nor by intention of the contracting parties did the title to the bed of the Arkansas river, where the same was navigable in fact, pass from the United States to the Cherokee Nation within the bounds of the tracts of land granted by the United States to said tribe under and by virtue of the treaties mentioned, but that it was retained and held by the United States in trust for the then future state, and that upon admission of the state of Oklahoma to the Union in 1907, the title thereto vested in and became the property of the state of Oklahoma. The Cherokee Tribe having acquired no interest in or title to the bed of the Arkansas river below high-water mark where it flows along the land involved, it follows that plaintiff in error acquired no right, title, or interest in or to the lands within the bed of the river below high-water mark.

"The judgment is affirmed." (Emphasis ours.)

V

THE FACTS AND HOLDING IN *HOLT STATE BANK* HAVE BEEN MISUNDERSTOOD AND MISCONSTRUED BY PETITIONERS AND BY AMICUS CURIAE. THE COURT OF APPEALS WAS CORRECT IN CONSTRUING AND APPLYING *HOLT STATE BANK*.

With relation to the beds of navigable waters a special rule of construction was laid down by this Court in *Holt State Bank*. This Court there said that if the United States intends to dispose of lands in a territory under navigable waters, such intention must be definitely declared or otherwise made very plain.

Respondents find in both petitions and the memorandum of *amicus curiae* the persistent expression of a misunderstanding of the facts and a misconstruction of the holding of the Court in *Holt State Bank*. To correct this misunderstanding and misconstruction we will state our understanding of the facts and holding of the Court as it applies to this case.

Before Minnesota became a state in 1858, the Chippewas had been the aboriginal inhabitants of a large part of northern Minnesota, and in particular a part that encompassed a lake known as Mud Lake. By a series of treaties with the United States made before Minnesota statehood it was agreed that the Chippewas relinquish their aboriginal right of occupancy to the general area (not their title, for title was then in the United States by conquest from England), and that in exchange, title to certain areas known as "reservations" was vested in the Chippewas. Two of those treaties were cited in the opinion of the Court in *Holt State Bank* (Treaty of September 30, 1854, 10 Stat.

L. 1109 and Treaty of February 22, 1855, 10 Stat. L. 1165). Both treaties contain provisions for the eventual allotment of lands in the reservations to tribal members. One reservation was known as the Red Lake Indian Reservation. Mud Lake was within that reservation. In 1889, pursuant to an act of Congress, provision was made that the Chippewas should cede back to the United States most of the Red Lake Indian Reservation including the part in the vicinity of Mud Lake; that the United States should then divide the land thus ceded and classify it as pine lands and agricultural lands; that the United States should dispose of the lands for cash considerations; and that the sums realized should be put in an interest-bearing trust fund for the Chippewas and ultimately disbursed for their benefit or distributed among them. If the Chippewas had acquired no title to the Red Lake Reservation by the treaties prior to Minnesota statehood (as argued by counsel for Petitioners) why was provision made therein for allotment to tribal members and why was provision made in the 1889 Act to have the Chippewas cede the lands to be sold back to the United States? The United States did recognize the title of the Chippewas to the Red Lake Reservation and did not undertake to sell the lands located therein until they were ceded by the Chippewas back to the United States so that the United States could sell and convey them. Among the tracts disposed of as agricultural lands under this 1889 Act were certain tracts bordering on Mud Lake. These tracts were sold to certain settlers, who thus became riparian owners, and patents were issued to them. Later, when Mud Lake was drained, large areas of land were laid bare which were adjacent to the tracts on the shore of Mud Lake which had been sold to settlers. The riparian owners along the

lake front contended that the lake was navigable when Minnesota became a state and that under the laws of Minnesota they were entitled to the land laid bare by the drainage and adjacent to their tracts. On the other hand, the United States insisted in behalf of the Chippewas that the lake was never more than a mere marsh and was not navigable and therefore the United States was entitled and was duty bound to dispose of the land under the Act of 1889 for the benefit of the Chippewas. The Court held that Mud Lake was a navigable body of water, and that under the treaties with the Chippewas prior to Minnesota statehood, there was no definite declaration that the United States intended to convey the bed of the navigable water bodies to the Chippewas or to recognize the bed of the navigable water bodies as belonging to the Chippewas even though Mud Lake was entirely within the Red Lake Reservation, the title to which had been vested in the Chippewas. The Court accordingly held that the bed of Mud Lake, a navigable body of water, passed to the State of Minnesota upon statehood in 1858 and then passed to the riparian settlers when the lake was drained. The law applied to these facts is stated by the Court as follows:

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improve-

ment of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. *Barney* v. *Keokuk*, 94 U.S. 324, 338, 24 L.ed. 224, 228; *Shively* v. *Bowlby*, 152 U.S. 1, 47, 48, 57, 58. 38 L.ed. 331, 348, 349, 352. 14 Sup.Ct.Rep. 548; *Scott* v. *Lattig*, 227 U.S. 229, 242. 57 L.ed. 490, 496. 44 L.R.A. (N.S.) 107. 33 Sup.Ct.Rep. 242; *Seattle* v. *Oregon & W. R. Co.*, 255 U.S. 56, 63. 65 L.ed. 500, 506. 41 Sup.Ct.Rep. 237; *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 83-85, 67 L.ed. 140, 144, 145, 43 Sup.Ct.Rep. 60. But, as was pointed out in *Shively* v. *Bowlby*, 152 U.S. 49, 57, 58, 38 L.ed. 349, 352, 14 Sup.Ct.Rep. 548, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so *has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency.* It follows from this that *disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*" (Emphasis ours.)

Among the authorities cited in the *Holt State Bank* case is the case of *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893). As stated in *Shively* v. *Bowlby*, no grants of land have been made by Congress of lands under navigable waters in any territory of the United States unless it became necessary to do so for one of the following purposes:

(1) to perform international obligations or (2) to promote commerce with foreign nations and among the several states, or (3) to carry out the public purposes appropriate to the objects for which the United States holds the territory—and the Court in *Holt State Bank* adds (4) *that if the United States intends to dispose of lands in a territory under navigable water for any of the foregoing reasons such intent must be "definitely declared or otherwise made very plain."*

VI

THE UNITED STATES ALWAYS RETAINED THE INTENTION, THE RIGHT, AND THE POWER TO INCLUDE THE LANDS CONVEYED TO PETITIONERS IN A FUTURE STATE, EITHER THROUGH AGREEMENT WITH THEM OR OTHERWISE.

Both the Choctaws and the Cherokees, in their petitions filed herein, argue that the "equal footing" doctrine upon which *Holt State Bank* is based is inapplicable because at the time of the relevant treaties and patents the United States intended that no future state would ever be established within the boundaries of the western lands ceded to the Indian Nations which are involved in this action.

Even assuming, *arguendo*, this was then the intention of the United States, *Holt State Bank* is nonetheless applicable, for it cannot be suggested, and petitioners make no attempt to do so, that the United States also intended to cut off access to its great Louisiana purchase lands lying west and north of the Indian Territory from which many future states would be, and later were carved, and to which the Arkansas River served as an avenue. It therefore is

historically most unreasonable to assume that unborn states were not then contemplated in a connection relevant to this litigation, and that the United States thus had no reason to retain title to the Arkansas River bed.

But we need not merely assume that future states were considered, nor that they were perceived as likely only in areas outside that granted the Indian Nations.

Article III of the "foundation document," the treaty of April 30, 1803 between the United States and France culminating the Louisiana purchase, provided as follows:

> "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the federal constitution and the enjoyment of all rights, advantages and immunities as citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

President Thomas Jefferson, in submitting this treaty to the Senate for ratification on October 17, 1803, made this comment:

> "Whilst the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States and an uncontrolled navigation through their whole course, free from collision with other powers and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our Treasury, an ample provision for our posterity, and a widespread for the blessings of freedom and equal laws." (Messages and Papers of the Presidents, Volume 1 at page 346.)

The division of the newly acquired territory into future states was considered by Congress as well:

> "Many complained bitterly of paying fifteen million dollars for the territory from which were to be carved Louisiana, Arkansas, Missouri, Oklahoma, Kansas, Nebraska, the two Dakotas, the greater part of Idaho and Montana, and parts of Texas, New Mexico, Colorado and Wyoming. An outrageous price! Rufus King, in his loftiest mood, was sure that with his diplomacy it could have been had for much less. They all agreed it was unconstitutional. But deep down, the resentment of the extreme New England Federalists was that *with the States ultimately to be carved from the new territory,* the dominance of their section would be lost" Bowers, "Jefferson In Power," at page 213. (Emphasis ours.)

And the idea that the Indian lands themselves might constitute a future state was presented directly to the Cherokees during the treaty negotiations. In a letter from Elias Boudinot to John Ross, Chief of the Cherokees, dated November 25, 1836, Boudinot stated:

> "According to the treaty, in no future time is a territorial government to be formed over these lands without the consent of the Cherokees. From these plain provisions you build an argument to show that the Indian title is subject, not only to Act of May, 1830, and to similar acts, but to other acts which may hereafter be made, and that if the government should see fit to organize a territory over the Cherokee country, the nation will become legally extinct, and the lands will revert to the United States and hence the title pretended to be given in the treaty is good for nothing. *This no doubt is conclusive reasoning from the premises.*" (Emphasis ours.) Senate Document No. 281, 52nd Congress, 1st Session.

Commissioner Schermerhorn, who signed for the United States in the treaty of New Echota, also mentioned this possibility, although Schermerhorn suggested Indian acquiescence in a future state:

> "I do not advise you to remove merely to get rid of your difficulties and the deadly influence by which you were surrounded, *but I look forward with confidence to the day when your several tribes of Indians shall there be organized into a territorial government,* with the rights and privileges of American citizens; *and that the time will yet come, when an Indian State will be added to our Federal Union;* and which, though the last, will be the brightest star and fairest stripe upon the banner of our nation, and fill up the measure of our country's glory." (Emphasis ours.) Papers and Correspondence on the Removal of Cherokees (1835-37); U. S. Department of Interior Library, E99 C5 U5.

But more convincing, and more to the point, whatever statements were made during negotiations, and however the treaties were worded, is the language of the title instruments themselves: the patents from the United States to the respective Indian Nations. With respect to all the lands granted, we have here not grants in fee simple absolute, but rather grants reflecting the obvious expectation of the United States that the establishment of the respective Indian Nations in their new locations might be merely temporary.

The Choctaw patent begins:

> "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple, to them and their descendants, *to inure to them while they*

shall exist as a nation and live on it. . . ." (Emphasis ours.) (Patent Records, U. S. Dept. of the Interior.)

Similarly, the Cherokee patent concludes:

"TO HAVE AND TO HOLD THE SAME, together with all the rights, privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject . . . and subject also to the condition provided by the Act of Congress of the 28th of May, 1830, referred to in the above recited third article, *and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation ceases and abandons the same . . .*" (Emphasis ours.) (Patent Records, U. S. Dept. of the Interior.)

Thus, on the face of the grants it is apparent that the United States retained residual title to all lands granted and that it consequently cannot be said as a matter of law, that the treaties and grants taken together conclusively preclude the possibility that future states were contemplated in the territories conveyed to the Indian Nations. This being so, the "equal footing" doctrine enunciated in *Pollard* v. *Hagan* is just as applicable to the lands which later became the State of Oklahoma as it was, in *Holt State Bank*, to those from which the State of Minnesota was formed.

Moreover, shortly before Oklahoma became a state, agreements were made by the United States with the Choctaws and Chickasaws and with the Cherokees for the relinquishment of tribal sovereignty and the allotment of the tribal lands in severalty and in fee to the tribal members and their freed slaves. This was tersely expressed in the opinion of the Court of Appeals as follows:

"In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land,[13] and the allotment of land to the individual members of the tribes. *The result was an agreement with the Cherokees*[14] *and with the Choctaws*[15] *which nullified treaties inconsistent therewith and which provided for the allotment of the lands.* These agreements were followed by the Act of April 26, 1906, 34 Stat. L. 137, which provided for final disposition of the affairs of the Five Civilized Tribes.[16] This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians."[17] (Emphasis ours.)

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[13] 27 Stat. L. 612, 645.

[14] 32 Stat. L. 716, 727.

[15] 32 Stat. L. 641, 656.

[16] These included the Chickasaws, Creeks, and Seminoles, in addition to the Cherokees and the Choctaws.

[17] 34 Stat. L. 148.

VII

COMMENTS ON MEMORANDUM OF UNITED STATES AS AMICUS CURIAE.

Several contentions raised by the United States in its memorandum require brief comment:

1. The statement is made, with reference to *Holt State Bank,* that: ". . . the court of appeals concluded that the United States intended to reserve title to the river bed circumscribed by the grants . . ." The Court of Appeals did not hold that there was any *reservation* of title but instead held that the United States simply *did not convey*

the title to the river bed. Since there was no conveyance by the United States of the river bed, no *reservation* was necessary.

2. The further statement is made that: ". . . If these had been private conveyances, there could be no question that a strip of land underlying a navigable river meandering through the blocks of land granted would be embraced in the grants. . . ." This completely disregards the law of Oklahoma that the beds of navigable streams between the high water marks belong to the State. *City of Tulsa* v. *Commissioners,* 101 P.2d 246 (1940); and *Lynch* v. *Clements,* 263 P.2d 153 (1953).

3. There is yet another fallacy in this memorandum. On page 6, where the United States contends that: ". . . the present cases pose an appropriate opportunity for this court to determine the degree of specificity required to make a showing that the government intended to transfer river beds to Indians rather than to reserve them in trust for a state whose potential creation was disavowed.", begs the question at issue and assumes the fact of a *reservation.* As pointed out above, the courts below held that the United States did not convey the river bed; therefore, no reservation was necessary.

4. The United States asserts that the language of the grants is "unqualified" and that the Indians acquired these tracts in fee simple. This is an incorrect statement. As shown in Section VI of this brief, the treaties and patents resulted in *qualified* grants, with reverter to the United States when the Cherokees and Choctaws ceased to exist as nations or to live upon the land.

5. The United States further asserts that there was no purpose for the United States to retain ownership of the Arkansas River. It is true that navigability of the river was not an issue in the Court of Appeals, all parties having recognized in that Court that the stretch of Arkansas River which is the subject of the suit is navigable in fact. However, this statement by the United States ignores these facts which are well known: The Arkansas River, from Ft. Smith at the Arkansas state line to Ft. Gibson at the confluence of the Arkansas and Grand Rivers, was a main artery of commerce before 1824. There were twenty-two established landings between Ft. Smith and Ft. Gibson. At the time of the Louisiana Purchase there were no roads or highways and very few established trails. The highways of travel were mostly along the rivers and streams, and the Arkansas River was one of these highways. For example, in 1829, the "James O'Hara," a 200 ton steamer, carried recruits for Ft. Gibson, and 100 Cherokee emigrants. Other boats regularly using the River were the "Yellowstone," the "Victoria," the "Wyoming" which traveled from Pittsburg, Pennsylvania to Ft. Gibson, and the "Niagara" which had accommodations for 70 cabin passengers. This use of the River as a highway then, was ample reason for the United States to retain ownership of this river.

6. The government also asserts that the treaties themselves do not sufficiently manifest an intention to retain the River in trust for a "hypothetical" state. The creation of states was considered as early as 1803 by Congress. Commissioner Schermerhorn discussed it in 1835, at the conference preceding the Treaty of New Echota with the Cherokees. We submit that the Indian State envisioned by

Commissioner Schermerhorn has, in large measure, come to pass, for, as stated above, Oklahoma citizens of Indian extraction are prominent in nearly every walk of life and fully participate in the affairs of local, state, and national government. "Hypothetical" does not apply to the State of Oklahoma.

7. Lastly, we find the reference to an Alaska case, *United States* v. *Stae of Alaska, et al.* (Civil A-152-67 D.C. Alaska), wherein a United States District Court has held that under the "equal footing" doctrine Alaska received title to the lands under navigable waters within the Kenai Moose Range established for the protection of wildlife. These claims involving Alaska lands would require a completely different analysis and application of law, for these lands were the subject of withdrawals rather than the subject of treaties. No patents or treaties were involved in that case. Moreover, in its one common issue, ownership of the beds of navigable waters, the decision of the District Court in Alaska is *not* in conflict with the decisions in the courts below in this case, but on the contrary, the decision there is in total agreement.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari be denied.

Respectfully submitted,

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March, 1969

APPENDIX A

FILED
SEP 25 1967
JOHN B. FINK
CLERK, U. S. DISTRICT COURT
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Choctaw and Chickasaw Nations, Plaintiffs, v. Ella M. Tibbetts, nee Ainsworth, et al, Defendants.	)	No. 5649-Civil
State of Oklahoma, ex rel, Chas. Nesbitt, Attorney General, Plaintiff, v. Sun Oil Company, a corporation, et al, Defendants.	)	No. 6143-Civil
Choctaw Nation and Chickasaw Nation, Plaintiffs, v. Cherokee Nation, Defendant.	)	No. 6166-Civil
Cherokee Nation or Tribe, Plaintiff, v. State of Oklahoma, et al, Defendants.	)	No. 6219-Civil

PRE-TRIAL ORDER

On January 13, 1967, a conference was held in these cases at which the legal, factual, and procedural issues and problems the cases have in common were discussed and

considered. Subsequently, on January 17, 1967, the court entered a memorandum setting out the principle issues determined at the conference to have been raised by the pleadings and authorizing the filing of briefs addressed thereto. Counsel for the parties, after reasonably necessary extensions of time therefor, submitted comprehensive and exhaustive briefs, and the cases were then set for further pre-trial and for oral argument on September 8, 1967. They are now before the court for entry of a pre-trial order controlling further proceedings.

The issues common to all of the cases are these:

1. The navigability of the Arkansas River in Oklahoma below its confluence with the Grand River.

2. The ownership of the bed of the Arkansas River below its confluence with the Grand River.

3. The effect of changes in the course of the Arkansas River upon riparian ownerships and upon ownership of the bed.

4. The immunity from suit of the Indian tribes involved, and the right of the State of Oklahoma to waive its sovereign immunity.

5. Jurisdiction of this court.

The cases are consolidated only for the purpose of entering this order resolving these issues, which will be filed as a pre-trial order in each case. Otherwise, the cases will be handled separately.

The claims of the parties which give rise to these issues are briefly stated below. Allegations in the pleadings presenting legal and factual issues not involved in the other cases and not resolved in this order are not included.

CASE NO. 5649—CHOCTAW & CHICKASAW NATIONS v. TIBBETTS, et al

In this case the Nations seek to quiet title to two tracts of land in this district which they claim were never allotted to individual members of the tribes pursuant to the Act of Congress of July 1, 1902 (32 Stat. 841), later ratified as a supplemental treaty on September 25, 1902. The land identified in the complaint as Tract 1 and more fully described as the W/2 of Lots 1 and 2 of Section 12, T9N, R25E, was a riparian property lying along the east bank of the Arkansas River as shown in the government survey of 1898. The property identified in the complaint as Tract 2, the full description of which need not be repeated here, is comprised of land which in 1898 was a part of the bed of the Arkansas River but which is now, because of a shift in the course of the river, dry and useable. The Nations demand possession of the tracts and compensation for their use by the defendants since 1946.

The basis upon which the Nations rest their claim to Tract 2, the river bed land, is the treaty concluded at Dancing Rabbit Creek in Mississippi on September 27, 1830 (7 Stat. 333), between the United States and the Choctaw Nation. Under the terms of the treaty the United States in exchange for the Choctaw tribal lands in Mississippi agreed to cede to the Nation as its domain west certain lands now comprising a part of the State of Oklahoma, and pursuant to the stipulation of the treaty the President of the United States issued a patent to the lands on March 23, 1842, following congressional authorization. The lands thus ceded became the jointly owned domain of both the Choctaw Nation and the Chickasaw Nation under the provisions of a treaty between the two tribes and the United States entered into on January 27, 1827 (11 Stat. 572). Both tracts involved in this suit, the Nations claim, were included in the lands ceded under the terms of the treaty for the reason that such lands included the Arkansas River in fee simple, without reservation or limitation.

[APPENDIX]

The State of Oklahoma by Charles Nesbitt, Attorney General, for whom by order of the court there was later substituted the State of Oklahoma on the relation of Dewey F. Barlett, Governor, asked and was granted leave to intervene as a defendant. In its answer and cross-complaint the State of Oklahoma denies the plaintiffs' claim to the old river bed, asserting that at the time Oklahoma was admitted to the Union the Arkansas River was navigable and that by reason thereof the State became the owner of the river bed and remains the owner although the river has shifted to another area. The State demands that its title be quieted.

The defendant Robert G. Carter by his answer and cross-complaint denies the ownership claims of the Nations to the two tracts, and alleges ownership in himself. The portion of the former river bed included in Tract 2 and the property comprising Tract 1 have both been added to his property, he claims, which in the hands of his predecessors in title lay along the west bank of the river opposite Tract 1, by accretion through the gradual movement of the river to the east, so that it has completely vacated its former bed and passed almost entirely over Tract 1. He also denies the navigability of the Arkansas River at this juncture and demands strict proof.

The defendant Tom Frank Tibbetts, individually and as Executor of the Estate of Ella M. Tibbetts, deceased, having been substituted by order of the court for the defendant Ella M. Tibbetts, claims that the E/2 of Lots 1 and 2 of Section 12, T9N, R25E, was allotted to Ella M. Tibbetts by the plaintiffs as a member of the Choctaw Nation; that thereafter the river gradually moved to the east, engulfing within the stream the W/2 of Lots 1 and 2 by 1927, with land being added to the land on the west side of the river; that land thus added was in existence in 1936, at which time Ella M. Tibbetts went into possession of both the east and west half of Lots 1 and 2 which had thus been restored

that Ella M. Tibbetts had been claiming and using such land since 1936 and claimed title by prescription; and that he is now the owner as the sole devisee of Ella M. Tibbetts, deceased.

CASE NO. 6143—STATE OF OKLAHOMA v. SUN OIL CO., et al.

This is a suit by the State of Oklahoma to quiet its title to land which formerly constituted the bed of a section of the Arkansas River in this district and which, it is alleged, was left dry when the river course was diverted by dams and jetties constructed for that purpose by the U. S. Corps of Engineers. It is the State's position, and that of intervening parties claiming interests through the State, that the Arkansas River is a navigable stream, that the State became the owner of the river and its bed upon admission to statehood on November 16, 1907, and that it continued to be the owner of the old bed when the river was diverted to a new course. The defendants, owners of pertinent riparian properties before the change in the river, and persons claiming interests through them, deny the State's claim, asserting ownership in themselves of the river bed. The Choctaw and Chickasaw Nations have intervened by leave of court, claiming ownership of the former river bed on the same grounds alleged in Case No. 5649.

CASE NO. 6166, CHOCTAW & CHICKASAW NATIONS v. CHEROKEE NATION

The Choctaw and Chickasaw Nations have sued the Cherokee Nation to quiet the title to the bed of the Arkansas River in them throughout its course as the northern boundary of the lands ceded to the Choctaws by the United States in the treaty at Dancing Rabbit Creek in Mississippi on September 27, 1830. Title is asserted to the bed of the river as it existed in 1898 and also as it exists at present where the change from the former bed was by gradual

action, together with any land in-between. The basis for the claim is the same as that set out in Case No. 5649: that this stretch of the Arkansas River was included in the lands ceded to the Choctaws, that the river is navigable, and that the bed was not included when the Choctaw lands were allotted to members of the tribe. The case is now pending on the motion of the Cherokee Nation to dismiss for the reason that the suit was not authorized by Congress and the Cherokee Nation is therefore immune from such action.

CASE NO. 6219, CHEROKEE NATION v.
STATE OF OKLAHOMA, et al.

The Cherokee Nation in this action lays claim to the Arkansas River in Oklahoma below the mouth of the Grand River and demands an accounting for and the payment of all proceeds received by the State for oil and gas and other leases covering the bed of the Arkansas River below its confluence with the Grand. The tribe claims this portion of the river is navigable, that it acquired title to the river in fee simple by the terms of its treaty with the United States of 1833, that the river has never been allotted to individual members of the tribe, and that the State of Oklahoma does not now and never has owned any part of the river bed and has no interest which it could lease for oil or gas or other purposes. The Nation also demands all future rentals or royalties due under such leases. The State of Oklahoma and the defendants claiming interests through the State deny the plaintiff's claim, asserting title in the State, and in their counter-claim demand that their title and interest be quieted against the Cherokee Nation.

After reviewing the files and reading the excellent briefs prepared by counsel for the parties, and considering the matter thoroughly, including the oral arguments of counsel, the court has reached the conclusions hereinafter set out with respect to the issues here involved.

1. *Navigability.*

The dominant issue in all of these cases, and upon which the others hinge in the main, is the navigability of the Arkansas River from its confluence with the Grand River in Muskogee County in this district to the eastern boundary of Oklahoma, a question of fact. It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year. Accordingly, it is the decision of this court, based upon judicial knowledge alone and without taking evidence, that this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation, and at the time the treaties were made pursuant to which the lands were ceded, and also at the time Oklahoma was admitted to statehood on November 16, 1907.

2. *Ownership of the River Bed.*

The parts of the treaties between the United States and the Choctaw Nation and the Cherokee Nation which require construction by the court to determine the validity of their respective claims to the Arkansas River are set out in the pleadings and in the briefs submitted by counsel. After considering these and the arguments of counsel relating thereto, the court has concluded that as a matter of law regardless of the area properly included within the

boundary descriptions of the tribal domains of the Choctaws and the Cherokees in what is now Oklahoma, it was not the purpose or intent of the United States to convey to either tribe ownership of any part of the Arkansas River below its confluence with the Grand River, and that no provision of any treaty with either tribe and no act of Congress or patent issued to the tribes had this effect. This section or part of the Arkansas River became the property of the United States following the Louisiana Purchase in 1803 and remained the property of the United States until Oklahoma was admitted to the union. At that time it became the property of the State of Oklahoma by operation of law, subject to the easement or other right of the United States to do all things required to maintain or restore the river as a navigable stream and to control its use as a highway of commerce.

3. *Effect of River Movement.*

It appears from the pleadings and is assumed by counsel in their briefs that since 1907 there has been considerable shifting in the course of the Arkansas River, generally gradually and imperceptibly but sometimes suddenly, by avulsion. Actually, this is a matter of common knowledge in these parts. It is well established in Oklahoma, and this court holds, that when the change has been gradual the ownership of the bed and the navigation easement of the United States has moved with the river, riparian owners gaining or losing ground depending upon the direction of the movement. The law is also well established that an avulsive change produces no change in riparian ownership. The court is of the view that this principle applies to the ownership of the river bed as well. Where there has been an avulsive change in the river since 1907, therefore, the navigation easement of the United States has followed the new course of the river, the new bed has remained the property of the owner before the change, and the old bed, wherever it was at the time the change occurred, has re-

mained the property of the owner of the land over which the river flowed, the State of Oklahoma or others, depending on whether there had been earlier avulsive changes.

4. *Sovereign Rights.*

A question of sovereign rights runs through all of these cases, but no serious dispute appears to exist about them except as to the right of the Choctaw and Chickasaw Nations to maintain their action against the Cherokee Nation. The Choctaw and Chickasaw Nations, the Cherokee Nation, and the State of Oklahoma are all clearly authorized under the law to institute actions of the kind here involved. It is equally clear that the State of Oklahoma is empowered to waive its sovereign immunity from such suits against it and that the Indian tribes are not. These tribes may be made parties defendant in an action only to the extent and for the purpose authorized by Congress, and no such authority exists for any such suit against them. This immunity from suit and lack of authority to waive immunity obtains, in the opinion of the court, where the suit is by one tribe against another as effectively to preclude such suit from being maintained as it does to preclude suit against a tribe by an individual or by the State. Where an Indian nation intervenes in a suit to assert a claim, however, as the Choctaw and Chickasaw Nations have done in Case No. 6143, State v. Sun, it is in the case for all purposes. But under this ruling the order allowing the State to intervene against the tribes in Case No. 5649 was improvidently entered.

5. *Jurisdiction.*

Except to the extent that sovereign immunity precludes maintaining suit, the court is satisfied that it has jurisdiction over the subject matter and the parties in these actions. With all rights asserted by the plaintiffs in the suits resting on the navigable character of the Arkansas River, long held to be a federal question, and with all property involved in the controversies within this district, this is the proper court for resolution of the differences giving rise to the suits.

In accordance herewith, orders should be entered for the disposition or further proceedings in each of the cases as follows:

The motion to dismiss in Case No. 6166, Choctaw and Chickasaw Nations v. Cherokee Nation, should be granted and the action dismissed. In Case No. 6219, Cherokee Nation v. State, judgment in favor of the defendants and against the plaintiff should be entered upon the pleadings. The remaining cases, No. 5649, Choctaw and Chickasaw Nations v. Tibbetts, and No. 6143, State v. Sun, should be set separately for further pre-trial and other hearings that may be necessary in preparation for trial to determine the nature and extent of the river movement alleged in the pleadings and the effect thereof on the ownership interests of the parties, together with other pertinent issues not herein resolved.

In the opinion of the court the conclusions herein, and the orders to be entered pursuant thereto, involve controlling questions of law as to which there is substantial ground for difference of opinion, and an appeal therefrom may in each case materially advance the ultimate termination of the litigation. For that reason, further proceedings in these cases will be stayed pending resolution of the issues on appeal from this order, if allowed and taken.

EDWIN LANGLEY
District Judge

APPENDIX B

FILED
OCT 10 1967
JOHN B. FINK
CLERK, U. S. DISTRICT COURT
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Cherokee Nation or Tribe, Plaintiff, v. State of Oklahoma, et al., Defendants.	)	No. 6219-Civil

AMENDMENT TO PRE-TRIAL ORDER

The pre-trial order entered herein on September 25, 1967, to the extent applicable to this case is amended as follows:

The Choctaw and Chickasaw Nations have by leave of court filed a petition in intervention alleging ownership in the Arkansas River bed below the high water mark from the confluence of the Arkansas River with the Canadian River to the eastern boundary of the State of Oklahoma adversely to the claim of the Cherokee Nation to this portion of the river and adversely to the claims of the defendants.

For the reasons set out in the pre-trial order, the court is of the opinion that the claim of these tribes to this portion of the Arkansas River bed is without merit and that judgment in favor of the defendants and against the intervenors should be entered upon the pleadings.

(signed) Edwin Langley
District Judge

APPENDIX C

FILED
NOV 15 1967
JOHN B. FINK
CLERK, U. S. DISTRICT COURT
By _____
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

The Cherokee Nation or Tribe of Indians in Oklahoma,	)	
Plaintiff,	)	
v.	)	
State of Oklahoma; Commissioners of the Land Office of the State of Oklahoma; Cities Service Oil Co.; Continental Oil Co.; Eason Oil Co.; Steve Gose; Jake L. Hamon; Humble Oil and Refining Co.; Jeffrey Sand and Gravel Co.; Lone Star Production Co.; Marathon Oil Co.; Mobil Oil Corp.; Pan American Petroleum Corp.; Skelly Oil Co.; Southland Royalty Co.; Stephens Production Co.; Sun Oil Co.; Tenneco Oil Co.; Union Oil Co. of California; and Yahola Sand and Gravel Co., a corporation;	)	No. 6219-Civil
Defendants.	)	

JUDGMENT

In accordance with the pre-trial order entered herein on September 25, 1967, and the amendment thereto entered October 10, 1967, and for the reasons therein stated,

the court is of the opinion, and so finds, that no grounds exist upon which there can be granted the relief prayed for by the plaintiff, The Cherokee Nation, or by the intervenors, the Choctaw and Chickasaw Nations, and that judgment should be entered against said Indian tribes and in favor of the defendants upon their counter-claims.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that upon being admitted to the union of states on November 16, 1907, the State of Oklahoma became by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma, in the Eastern District of Oklahoma, said river being a navigable stream throughout this portion of its course, subject only to the right of the United States to maintain or restore the navigability of the river and to control its use as a highway of commerce between states; that against the Cherokee Nation and the Choctaw and Chickasaw Nations, now claiming ownership thereof as unallotted lands of their western domains, the title of the State of Oklahoma, and of all defendants herein claiming an interest through the State, is quieted and said tribes are barred and enjoined from asserting ownership or other claims adverse to said defendants; and that said Indian tribes have no right or interest in any money or other proceeds realized or which may be realized by the State of Oklahoma or the other defendants from the lease or rental or other use of said lands.

IT IS FURTHER ORDERED that each of the parties herein shall bear its own costs.

EDWIN LANGLEY
District Judge

APPENDIX D

OKLAHOMA INDIAN LAND LAWS

Second Edition

By Lawrence Mills

Published 1924

(Thompson Law Book Co.)

CHAPTER II.

AUTHORITY OF CONGRESS OVER THE INDIANS

§ 4. Title by Discovery.

5. Relation of Indian Tribes to the United States.

6. Treaty with Indian Tribe Not a Contract.

7. United States Citizenship.

8. Authority of Congress, Plenary.

§ 4. *Title By Discovery.*—Upon its discovery by Europeans, America was in the exclusive possession of the Indians, a people in a state of barbarism, who lived by hunting, and practiced agriculture only in a most limited and primitive manner. To the minds of the Europeans, America was a virgin and unpeopled continent, and they found no difficulty in convincing themselves that the natives were more than compensated for the loss of their independence by the blessings of Christianity which they were able to bestow. Accordingly, the great nations of Europe lost no time in appropriating to themselves such parts of the new world as they were able to acquire. But as each of these nations was in pursuit of the same object, it was necessary, in order to avoid war and contentions between themselves, to establish a principle governing such acquisition that should be acknowledged and observed by them all. This principle was found in the doctrine that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments. The relation between the discoverer and the Indians

who inhabited the territory, did not concern the other European nations and became a matter of policy for each nation to determine for itself.

By each of the nations, England, France, Spain and Holland, who laid claims to parts of North America by virtue of the title of discovery, the right of occupancy was recognized in the Indians, but the ultimate dominion and sovereignty of the soil was asserted in themselves. Each asserted as a corollary of its claim of ultimate dominion, the exclusive prerogative to extinguish the Indians' right of occupancy and denied to all others the privilege of acquiring any interest in the soil by grant from the Indians.

As a result of the war by which the independence of America was achieved, the United States succeeded to all of the dominion, sovereignty and right which England had theretofore had to the soil of America, except Canada, and the rights of France and Spain were afterwards acquired by purchase. The title of the United States to the land occupied and claimed by the Indians is thus based upon conquest, but its validity is a political and not a judicial question, and the manner of its acquirement was recognized as legitimate by all of the civilized nations of the world. Chief Justice Marshall has summed up the question as follows:

"We will not enter into the controversy whether agriculturalists, merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all of the lands occupied by the Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which

occupancy gave to them. These claims have been maintained and established as far west as the Mississippi River by the sword. The title to a vast portion of the land we now hold, originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it."[1]

§ 5. *Relation of Indian Tribes to United States.*—The relation of the Indian tribes to the United States has from the beginning been of an anomalous and complex character. Though they occupied territory within the boundaries of the United States they were not a political part of the United States.[2]

Each tribe constituted a distinct, independent, political community, exercising within its territory and with respect to its internal affairs, all of the powers of local self-government and administering its own laws, customs and usages. It was, in every respect, a Nation, within the general acceptation of that term and capable of contracting treaties as such.[3]

But while the several tribes exercised all the attributes of sovereignty within their recognized tribal domains, they occupied territories to which a superior power asserted and maintained the ultimate dominion and the exclusive right to the soil upon the extinguishment of the right of occupancy conceded to the natives. The assertion of dominion by the United States was inconsistent with complete sovereignty in the Indian tribes, and the attempt of any foreign nation to enter into relations with them, or to acquire any interest in their lands, would be considered an invasion of the sovereignty of the United States and an act of hostility. By virtue of such claims of dominion, an Indian tribe was

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[1]Johnson v. McIntosh, 8 Wheaton, 574; 5 L. Ed. 541; Cherokee Nation v. Georgia, 5 Peters 48; 8 L. Ed. 296.

[2]In re Crow Dog, 109 U.S. 556; 27 L. Ed. 1030.

[3]Worcester v. Georgia, 6 Peters 575; 8 L. Ed. 483; Turner v. U. S., 248 U.S. 354; —L. Ed.—.

not, with respect to the United States, a foreign nation within the meaning of the provisions of the Constitution giving the federal courts jurisdiction of controversies "between a State or citizens thereof, and foreign states, citizens or subjects," and it could not maintain a suit therein.[4]

Full authority and sovereignty over the Indian tribes has been exercised by the Federal government through Congress from the beginning varying in the extent of its application only by expediency or the power of the United States to enforce it. Such authority of the general government does not emanate from any particular section of the Constitution and is not derived from the provision granting it "power to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It is much broader than that. It is an inherent one, arising from its political relations with those dependent people. This sovereignty of the government is exercised through Congress as the instrument established by the Constitution for the expression of its legislative will. Justice Miller in United States v. Kagama, has outlined the source of the authority of the Federal government over the Indian Tribes as follows:

"The power of the General Government over these remnants of a race, once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes."[5]

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[4]Cherokee Nation v. Georgia, 5 Peters 48; 8 L. E. 296; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L.E. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; United States v. Rogers, 4 Howard 572; 11 L.E. 1105; Jones v. Meehan, 175 U.S. 1, 44 L.E. 49.

[5]United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041.

The tribes were declared by Chief Justice Marshall in Cherokee Nation v. Georgia, to be in a "state of pupilage," and their relation to the United States to be that of a ward to his guardian. Such designation has been generally adopted by the courts as expressive of the authority of the United States over the Indian tribes, who are usually referred to as "wards of the Nation," "pupils," "local dependent communities."

By reason of the relation between the United States and the tribes, the exercise of its authority is a political question, addressing itself solely to Congress and not subject to control by the courts. Congress has plenary power and authority over the tribes, tribal affairs and property when it sees fit to exercise it, and from the very nature of the relation, there is no authority above Congress that they can invoke.[6]

§ 6. *Treaty With Indian Tribe Not a Contract.*—It has been the practice of the United States from the beginning of the government to the present time to exercise its paramount authority over the Indians by treaties negotiated with the different tribes. Such treaties are not contracts and confer no vested rights upon the tribes which are within the protection of the Constitution. They are effective, not as treaties but as acts of Congress and do not impair the power of Congress to further legislate upon the same subject matter, even in violation of the terms of the treaties.

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[6]United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L.E. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; In re Crow Dog, 109 U.S. 556, 27 L.E. 1030; M.K. & T. Ry. Co. v. Roberts, 152 U.S. 114, 38 L.E. 377; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Gritts v. Fisher, 224 U.S. 639, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; 32 Okla. 247; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.

Whatever may be the moral obligation to keep inviolate the treaties entered into with the Indian tribes, the sovereignty of the United States cannot be concluded by its own legislative enactments, should occasion arise for the further exercise of its authority.[7]

Where, however, rights have vested in the individual as distinct from the tribe, under a treaty or act of Congress, such rights are within the protection of the Constitution and cannot be divested by subsequent act of Congress.[8]

§ 7. *United States Citizenship.*—The Indian tribes were not a political part of the United States, and prior to March 3, 1901, the members of the Five Civilized Tribes were not citizens of the United States. By the General Allotment Act of February 8, 1887, every Indian born within the United States to whom an allotment was made was declared to be a citizen of the United States with all the rights, privileges and immunities thereof. The Five Civilized Tribes were excluded from the General Allotment Act, but by Act of March 3, 1901, section 6 of that Act was amended by the insertion in the appropriate place, of the words "and every Indian in Indian Territory." By such amendment United States citizenship was bestowed upon all the members of the Five Civilized Tribes.[9]

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[7]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Tobacco v. United States, 11 Wall, 616, 20 L.E. 227; United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E 941.

[8]Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Jones v. Meehan, 175 U.S. 1, 44 L.E. 49.

[9]Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 95 Pac. 792; Heckman v. U.S., 224 U.S. 410, 56 L.E. 820; Wiley v. Edmondson, 43 Okla. 7, 133 Pac. 38.

They acquired State citizenship upon the admission of Oklahoma into the Union.[10]

§ 8. *Authority of Congress, Plenary.*—The plenary authority, often called guardianship, of Congress over the tribe, tribal affairs and tribal property, authorizes, with or without the consent of the tribe, the dissolution of the tribe, the distribution and allotment of the tribal property and the imposition of such restrictions upon the alienation of the lands of the members, wherever and in such manner, as Congress may in its judgment deem expedient.[11]

The passage of the Act of June 28, 1898 (Curtis Act), was a valid exercise of the legislative authority of Congress over the Five Civilized Tribes.[12]

And the authority of Congress to distribute and allot the lands of the tribes in severalty to the members thereof necessarily included the authority to ascertain and declare who should constitute the membership of the tribes and share in the distribution of the land.[13]

And as a part of its plan of allotment in severalty and for the purpose of protecting the Indians in the enjoyment of their lands, it was authorized to impose upon the land of the individual members limitations or restrictions upon its alienability.[14]

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[10]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Chisholm v. Creek & Indiana Development Co., 273 Fed. (DC) 589.

[11]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Nation v. Hitchcock, 187 U.S. 208, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820.

[12]Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; Cherokee Nation v. Hitchcock, 187 U.S. 294, 47 L.E. 183.

[13]Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928.

[14]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

Nor was its power exhausted when the land was allotted in severalty subject to the restrictions it had imposed. Such allottees, with respect to their allotted lands are still tribal Indians and subject to the guardianship of Congress until that guardianship shall be terminated by Congress itself; and it is for it to say when and under what conditions that guardianship shall cease. Accordingly, it has been held that the United States may maintain suits in its own name for the purpose of enforcing the restrictions it has imposed upon the alienation of the lands of the allottees of the several tribes.[15]

It may remove the restrictions prior to the expiration of the time originally prescribed.[16]

Or extend the restricted period beyond the original term.[17]

Or impose restrictions upon lands, which were at the time subject to unrestricted alienation.[18]

And such power in Congress is not inconsistent with United States citizenship in the Indians or affected by such citizenship.[19]

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[15]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Mullen v. United States, 224 U.S. 448, 56 L.E. 834; Goat v. United States, 224 U.S. 458, 56 L.E. 841; Deming Investment Co. v. United States, 224 U.S. 471, 56 L.E. 847.

[16]Williams v. Johnson, 239 U.S. 414, 60 L.E. 358, 32 Okla. 247, 122 Pac. 485; McIntosh v. Dill, 86 Okla. 1, 205 Pac. 917.

[17]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738.

[18]Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

[19]Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. ~~976~~ 41

THE CHOCTAW NATION and THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

No. ~~1104~~ 59

THE CHEROKEE NATION OF TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS

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In the
Supreme Court of the United States
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No. 976

THE CHOCTAW NATION and THE CHICKASAW NATION,
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STATE OF OKLAHOMA, ET AL.,
Respondents.

THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS

This is an appeal by the Choctaw and Chickasaw Nations from the judgment of the United States Court of Appeals for the Tenth Circuit entered on the 31st day of October, 1968, in cases numbered 9924 and 9925 in that court, and which is reported at 402 F.2d 739.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit in each of these cases was entered on the 31st day of October, 1968. Certiorari was granted on April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

TREATIES AND ACTS OF CONGRESS INVOLVED

This case involves the Treaty of Doak's Stand in 1820 (7 Stat. 210, Proc., Jan. 8, 1921), the Treaty of Washington (7 Stat. 234, Proc., Feb. 19, 1825), the Indian Removal Act of May 28, 1830 (U. S. Statutes at Large, IX, 411-12), the Treaty at Dancing Rabbit Creek, September 27, 1830 (7 Stat. 333, Proc., Feb. 24, 1831).

QUESTIONS PRESENTED FOR REVIEW

Was the cession of lands west of the Mississippi to the Choctaws by the Treaties of 1820 and 1830 a purpose appropriate to the objects for which the United States held the territory?

When the Treaties of 1820 and 1830 were entered into, was it understood between the United States and the Choctaws that the area ceded to the Choctaws was to be embraced within a future state?

Is *U. S.* v. *Holt State Bank,* 270 U.S. 49, a relevant precedent?

Are the guidelines for the construction of the Treaty of Doak's Stand in 1820 and the Treaty at Dancing Rabbit

Creek in 1830 to be found in *Northern Pacific Railway Company* v. *Soderberg*, 188 U.S. 526, and *Caldwell* v. *United States*, 250 U.S. 14, or in *Choctaw Nation* v. *United States*, 119 U.S. 1; *Jones* v. *Meehan*, 117 U.S. 1, and *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423?

Did the Atoka Agreement of April 23, 1897 (30 Stat. 506), or the Act of June 28, 1898, commonly called the Curtis Act (30 Stat. 495), effect a retrocession of the bed of the nevigable portion of the Arkansas River to the United States?

STATEMENT OF THE CASE

This case involves the ownership of the avulsed beds and the oil and minerals underlying the navigable portion of the Arkansas River in Oklahoma.

The State of Oklahoma claims to own all the bed of the navigable portion of the Arkansas River within Oklahoma. The Choctaw and Chickasaw Nations also claim to own all of the bed of the navigable portion of the Arkansas River from its confluence with the Canadian River to the eastern boundary of Oklahoma. The Cherokee Nation contends that the thread of the river is the boundary between the Cherokee Nation to the north and the Choctaw Nation to the south, and claims to own the bed of the navigable portion of the Arkansas River lying in the interior of the Cherokee Nation.

This action arose after the State of Oklahoma had leased a sizeable part of the bed of the navigable portion of the Arkansas River within Oklahoma to several oil companies.

The action was commenced in the United States District Court for the Eastern District of Oklahoma by the Cherokee Nation against the State of Oklahoma, the several oil companies and one sand and gravel company, who claimed as lessees of the State of Oklahoma (A 5a, 105a). The Choctaw and Chickasaw Nations intervened. The State of Oklahoma answered and counter-claimed (A 91a). So did the oil companies and the sand and gravel company. The trial court entered judgment on the pleadings in favor of the State of Oklahoma and against the Choctaw and Chickasaw Nations and the Cherokee Nation. An appeal was taken to the United States Court of Appeals for the Tenth Circuit, which affirmed the judgment of the trial court (A 131a).

In their aboriginal state, the Choctaws, Chickasaws and Cherokees occupied large areas in the southern states. The explosive development of the cotton economy around the commencement of the nineteenth century brought great pressures by white planters upon the Federal Government to move the Indians out of the southern states. The Louisiana Purchase provided a reasonably accessible place to which the southern Indians were expected to be moved.[1]

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[1] Within a year after the Louisiana Purchase was made, Congress passed the Act of March 26, 1904, entitled "An Act erecting Louisiana into two territories and providing for the temporary government thereof." Section 15 of that Act provided that: "SEC. 15. The President of the United States is hereby authorized to stipulate with any Indian Tribes owning lands on the east side of the Mississippi, and residing thereon, for an exchange of lands, the property of the United States, on the west side of the Mississippi. . . ."

On August 23, 1830, Andrew Jackson, then President of the United States, was to say to the Chickasaws that they could only be preserved as a Nation by conseniing: ". . . to remove to a country beyond the

The Cherokees were the first of the southern tribes to yield to these pressures. By the Treaty of 1817 they gave up their lands in the southern states for a fee-simple title to lands in what is now Arkansas. Article V of that treaty recited that the lands ceded to the Cherokees ". . . is to commence on the north side of the Arkansas River, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line northwardly to strike Chataunga mountain, or the hill first above Shield's Ferry on White River, running up and between said rivers for complement, the banks of which rivers to be the lines . . ."[2]

Before the Choctaws had time to enter in possession of their new territory it was discovered that the land ceded to them in Arkansas was already occupied by white settlers. The Federal Government, realizing the difficulty of dislodging these white families, decided to induce the Choctaws to relinquish the land in Arkansas. In 1824 a delegation of Choctaws were invited to Washington to negotiate a treaty that would relocate the eastern boundary of the land ceded to them by the Treaty of 1820. On November 9, 1824, John C. Calhoun, the Secretary of War, addressed a letter to the Choctaw delegation then in Washington, in which he

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[1] (Continued)

Mississippi, which for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone." Senate Documents Indian Removals 23rd Congress 1st Session. Document 512 (Vol. II) Correspondence on the subject of the Emigration of Indians, between November 30, 1831, and December 27, 1833. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

[2] The Treaty at Cherokee Agency, July 8, 1817, 7 Stat. 156, Proclamation December 26, 1817.

said: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory. . . ."*[3]

A treaty was entered into on January 20, 1825, in the City of Washington[4] by which the Choctaw Nation retroceded to the United States: ". . . all that portion of the land ceded to them by the second article of the Treaty of Doak's Stand, as aforesaid, lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south to Red River; it being understood that this line shall constitute, and remain, the permanent boundary between the United States and the Choctaws; and the United States agreeing to remove such citizens as may be settled on the west side to the east side of said line, *and prevent future settlements from being made on the west thereof.*"

The emigration contemplated in the Treaty of 1820 was slow.[5]

In 1826, General William Clark, General Thomas Hinds, and General John Coffee, as Commissioners for the United States, held a council with the Choctaws in Florence, Alabama. In an address on November 11, 1826, they said to the Choctaws:

> "The United States have a large unsettled and unappropriated land on the west side of the great river

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[3] American State Papers, Indian Affairs, Vol. II, pp. 549-551.

[4] 7 Stat. 234, Proclamation, February 19, 1825.

[5] By 1829 about 150 Choctaws had been induced to settle in their new territory. Debo, *Rise and Fall of the Choctaw Republic,* at page 50.

Mississippi, *unto which they do not intend that their white settlers shall extend.*"[6]

On the 13th of November, the commissioners submitted for the consideration of the Choctaws the terms upon which they were authorized to propose a cession by the Choctaws of their remaining lands in the State of Mississippi. The commissioners brought to the attention of the Choctaws the object of their mission, saying:

> ". . . but if you are satisfied that under such condition of things you cannot be happy, consent to move beyond the Mississippi, where you will be away from the white people and from their laws, and be able to live under your own.
>
> * * * * * * *
>
> ". . . and your white father can bring you forth; and can keep the white mans laws from interrupting and disturbing you; and there I will guard you against all enemies, whether they be white or red; *and no State or Territory will be created.*"[7]

But, the people of Mississippi did not wait for the success of these Federal schemes for the removal of the Choctaws. In 1829, the Legislature provided for the extension of State laws over Choctaw and Chickasaw land adjacent to organized counties. And on January 19, 1830, Tribal governments were abolished under penalty of fine and imprisonment to any Indian who should exercise the "office of Chief,

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[6] American State Papers, Indian Affairs, Vol. II, page 711.

[7] Senate Document 512, Vol. II, pages 255-258.

Mingo, Head Man, or other post or power established by the Tribal Statutes, ordinances or customs of the Indians."[8]

On May 28, 1830, Congress passed an act which provided:[9]

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* that it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there; and to cause each of said districts to be so described by natural or artificial marks, as to be easily distinguished from every other.
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> * * * * * * *
>
> Sec. 3. *"And be it further enacted,* that in making of any such exchange or exchanges, *it shall and may be lawful for the President solemnly to assure the tribe*

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[8] Laws of Colonial State Governments relating to Indians and Indian Affairs from 1633 to 1831, inclusive (Washington 1832), pp. 242-243, see also Niles Register XXXVIII (1830) 73.

On February 22, 1873, the Committee of Indian Affairs in a report to the House of Representatives of the Third Session of the 42nd Congress in reviewing these events said: "The course adopted by the State of Mississippi was necessarily compelling a conflict of authority between the United States and the State of Mississippi, or else an abandonment by the United States of its former treaty-stipulations with the Choctaws, and a gross violation of its agreements with them, by which it had received of the Choctaws vast tracts of country in said States of Mississippi and Alabama."

[9] Commonly called "The Removal Act"; U.S. Statutes at Large IX 411-12.

or nation with which the exchange is made; that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them, and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same."

Shortly after Andrew Jackson took office as President, Georgia tore up Federal treaties and annexed the territory of the Cherokee and Creek Nations; Mississippi and Alabama did likewise in the case of the Choctaws and Chickasaws. The answer of the Cherokees was to engage William Wirt of Baltimore, formerly Attorney General and an eminent constitutional lawyer, to take their case into court on the issue denying a state's right to annul a Federal contract. As no state possessed this right, the outcome of any suit, once it should reach the Supreme Court, seemed a foregone conclusion.[10]

Andrew Jackson, fearing the outcome of *Cherokee Nation* v. *Georgia,* and never being one to assume a posture of meekness toward the courts (particularly where Chief Justice John Marshall was concerned), directed his Secretary of War, John H. Eaton, to arrange a meeting with the Choctaws and Chickasaws at Franklin, Tennessee, for August 23, 1830. So on June 1st, four days after the passage of the Removal Act, Secretary Eaton wrote the Chickasaws and the Choctaws inviting them to meet with him and the President at Franklin, Tennessee. He professed the benevolent purpose of the Government to remove them from the hostile jurisdiction of Mississippi saying:[11] "Congress has

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[10] *Cherokee Nation* v. *Georgia,* 5 Pet. 1.

[11] Senate Document 23d Congress, 1st Session, 512 II, 3).

passed a law manifesting a desire that you should remove and have liberally prepared the means for taking care of you."

Commenting on the remarkable circumstances of the President of the United States journeying to an Indian Council Ground for the purpose of making a treaty, Marquis James said in his Pulitzer Prize winning biography of Jackson: [12] "General Jackson traveled westward to cut the ground from under the courts by persuading as many Indians as possible to agree to emigrate before any suit should come up for adjudication. Of the Choctaws and Chickasaws he had strong hope . . ."

When Jackson reached the meeting place only the Chickasaws had appeared. His overtures to the Chickasaws were characteristic of the advances his commissioners were to make to the Choctaws the following month at Dancing Rabbit Creek. He deplored the inability of the Federal Government to protect the Indians from intrusions of the white settlers and the harrassments of governments of the southern states and recounted the desires of the Indians to live in peace and maintain their tribal existence. His placations confirmed the intention of the Government that the lands west of the Mississippi to which the southern Indians were proposed to be moved would never become a part of any State or Territory. Hear the suasions of Jackson: [13]

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[12] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2, at page 246.

[13] Senate Documents Indian Removals 23d Congress 1st Session. Document 512 (Vol. II) Correspondence on the subject of the Emigration of Indians, between November 30, 1831, and December 27, 1933. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

"Brothers, listen: The only plan by which this can be done, and tranquillity for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. *Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.*

* * * * * * *

"Peace invites you there, annoyance will be left behind; *within your limits, no State or Territorial authority will be permitted;* intruders, traders and above all, ardent spirits, so destructible to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission."

Marquis James recounts:[14] "The Indian dignitaries retired for consultation. General Jackson stepped into his carriage and drove away, leaving John Henry Eaton and General John Coffee to complete the negotiations. At the Hermitage he received word of the Chickasaws capitulation. They would cross the Mississippi in 1832. Meantime the Choctaws agreed to treat. Directing Eaton and Coffee to meet them, the President set out for Washington the first week in September."

Secretary Eaton and General Coffee proceeded from Franklin, Tennessee, to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on September 15, 1830. On September 18th they exhorted the Choctaws:

"Brothers: hesitate not, determine what you mean to do on this important occasion; record the votes of your

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[14] Andrew Jackson (Portrait of a President) by Marquis James, Vol. 2, at page 248.

head-men, and let us know who amongst you are willing to remove and who are opposed. The sense of the nation will thus be correctly ascertained, and the question which has so much agitated you be finally put to rest: say it is your determination to remain, and the subject is done with—we shall then trouble you with our talks no more. But decide to remove, and liberal provisions will be made to carry you to a country where you can be happy, and where already your fathers and brothers have gone in peace to reside. It is a desirable region, double in extent to the one you occupy, and large and fertile enough for twice or three times the number of people you have. There your great father can be your friend; there he can keep the white man's laws from interrupting and disturbing you; and there, too, he will guard you against all enemies, whether they be white or red. *There no State or Territory will be created* and he will have it in his power to protect you fully in your usages, laws, and customs. Here he cannot do these things, because neither he nor Congress possess authority to prevent the States from extending their jurisdiction over you, and throughout their limits."[15]

A treaty was concluded on September 27th, and a supplement was adopted on September 28th.[16] It provided that "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, *in fee simple* to them and their descendants, to inure to them while they shall exist as a

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[15] Senate Documents Indian Removals, 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, pp. 256, 257, 258.

[16] Treaty at Dancing Rabbit Creek September 27, 1830, 7 Stat. 333, Proclamation February 24, 1831.

nation, and live on it, beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork; *if in the limits of the United States,* or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeable to the Treaty made and concluded at Washington City in the year 1825. The grant to be executed so soon as the present Treaty shall be ratified."

Article IV of the treaty provided that: "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; *and that no part of the land granted to them shall ever be embraced in any Territory or State; . . .*"[17]

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[17] The southern tribes were the Cherokees, Choctaws, Chickasaws, Creeks and Seminoles. Their removal from the southern states was a concerted action. They were all removed to lands in what became known as the Indian Territory and what is now the eastern and southern portions of Oklahoma. That country was intended as the permanent abiding place of such tribes, where as self-governing communities, they should be free to enjoy their own tribal laws and customs forever, free from the interference or encroachment of the whites. By the treaty with the Cherokees of May 6, 1828, the United States guaranteed that their permanent home west of the Mississippi "shall never, in all future time, be placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension in any way, of any of the limits of any existing Territory or State," and practically the same guarantee was reaffirmed in the treaty of December 29, 1835. And by the treaty with the Chickasaws of May 24, 1834, the Government consented to protect the tribes in this new home against any other tribe

For three-quarters of a century this guarantee was to be the Magna Charta of the national existence of the Choctaw Nation.

ARGUMENT

Before the American Revolution, the English Crown opened the beds of navigable waters. After the American Revolution, the thirteen states succeeded to the rights of the Crown. In accepting a new state into the Union the Federal Government relinquished to the new state the title which it had to the beds of the navigable streams within that state. But ". . . Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory."[18]

It is settled law in this country that ". . . where the United States, after acquiring the territory and before the

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[17] (Continued)
and from the whites, and agreed to keep them without the limits of any State or Territory. By Article 14 of the treaty of March 24, 1832, the Creeks were guaranteed "that no State or Territory should ever have a right to pass laws for the government of said Indians, but that they should be allowed to govern themselves, etc." And by joint treaty with the Creeks and Seminoles of August 7, 1856, it was provided that no State or Territory should ever pass laws for said tribes, and that no portion of their lands should ever be embraced or included in a State or Territory.

[18] *Shively* v. *Bowlby*, 152 U.S. 1, 48, 38 L.Ed. 331, 349.

creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly."[19]

Oklahoma contends that the United States never abandoned the intention eventually of including all whites and Indians who moved westward as citizens in one or more states; that the United States always retained the intention, the right and the power to include the lands conveyed to the Choctaws and Chickasaws in a future state, either through agreement with them or otherwise.[20]

Oklahoma also contends that the Arkansas River was only aluded to in the treaties and the patent to the Choctaws as a monument or a reference point.[21] Finally, as we read their brief in opposition to the Petition for Certiorari, Oklahoma contends that the Atoka Agreement of April 23, 1897 (30 Stat. 506), effected a retrocession of the bed of the

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[19] *United States* v. *Holt State Bank*, 270 U.S. 49, 55, 70 L.Ed. 465, 468.

[20] It states this as its proposition and argues it *in extenso* at pages 25, *et seq.*, of the brief which it filed in this Court in opposition to the petition of the Choctaw and Chickasaw Nations for certiorari.

[21] At page 14 of its brief in opposition to the appellants' petition for certiorari, Oklahoma said: "What have Petitioners to offer to show this public highway of commerce was conveyed to them? Mere references to the Arkansas River—obviously as a boundary, a monument or a reference point."

navigable streams within the land of the Choctaw Nation to the United States.[22]

Under the Constitution, the United States has the power to convey a fee-simple title to Indian Tribes.

Indian Tribes are capable of taking lands as owners in fee simple by purchase where the United States, for a valuable and adequate consideration, so sell such lands to them.[23]

In an opinion delivered by Mr. Justice Reed, in *Rynes* v. *Grimes Packing Company,* 337 U.S. 86, 103, 104, 93 L.Ed. 1231, 1247, the Court said:

> "Since Congress, under the Constitution, Section 3 of Article 4, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, *even a title equal to fee simple, as in its judgment is just.* Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 339, 340, 89 L. ed 985, 990, 991, 65 Sup. Ct. 690." (Emphasis supplied.)

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[22] At the last paragraph, page 29, of its brief in opposition to petition for certiorari, Oklahoma says abstrusely: "Moreover, shortly before Oklahoma became a state, agreements were made by the United States with the Choctaws and Chickasaws and with the Cherokees for the relinquishment of tribal sovereignty and the allotment of the tribal lands in severalty and in fee to the tribal members and their freed slaves. This was tersely expressed in the opinion of the Court of Appeals as follows: "In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land, and the allotment of land to the individual members of the tribes. *The result was an agreement with the Cherokees and with the Choctaws which nullified treaties incon-*
(Continued on page 17)

[23] 42 C.J.S. 694, 27 Am. Jur. 566 and authorities cited thereat.

By the Treaty at Doak's Stand in 1820 and the Treaty at Dancing Rabbit Creek in 1830, the United States conveyed to the Choctaw Nation the fee-simple title to the lands west of the Mississippi situated in what is now Oklahoma.

By Article I of the Treaty concluded at Doak's Stand on April 18, 1820, the Choctaws ceded to the United States a part of the lands owned by them in Mississippi.[24] Article II of the Treaty provides:

> "For and in consideration of the foregoing cession on the part of the Choctaw Nation, and in part satisfaction for the same, the Commissioners of the United States on behalf of the United States, do hereby cede to said Nation, a tract of country west of the Mississippi River . . ."

On September 27, 1830, the United States entered another treaty with the Choctaws at Dancing Rabbit Creek[25] by which the Choctaws ceded to the United States the rest of the land they owned in Mississippi. The treaty provided for minor gifts to the Indians and by Article II the United States again conveyed to the Choctaw Nation the lands west of the Mississippi River situated in what is now Oklahoma:

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[22] (Continued)
sistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. L. 137, which provided for final disposition of the affairs of the Five Civilized Tribes. This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians." (Emphasis appeared in Oklahoma's brief.)

[24] 7 Stat. 210.

[25] 7 Stat. 333.

". . . in fee simple, to them and to their descendants, to inure to them while they shall exist as a nation and live on it . . ."

Mr. Justice Holmes, speaking for the Court in *Fleming* v. *McCurtain*, 215 U.S. 56, 59, 54 L.Ed. 88, 91, said:

"We should mention, however, that the United States already had ceded this tract to the Choctaw Nation with no qualifying words by the Treaty of October 18, 1820 (Art. II, 7 Stat. at L. 210 Choctaw Nation v. United States, 119 U.S. 1, 38, 30 L. Ed. 306, 318, 7 Sup. Ct. Rep. 75. The Treaty of 1830 only varied the description a little and provided for a special patent."

The conveyance of the fee title to the lands in Oklahoma to the Choctaws by the Treaties of 1820 and 1830 and by the patent of 1842 and the removal of the Choctaws on to those lands were each "a public purpose appropriate to the objectives for which the United States held the Territory."

The desire of the Federal Government to move Indians out of the southern states is such a commonly-known fact that the Court may take judicial notice of it. It would be an unnecessary labor upon the Court to cite the endless historical writings on the subject. Sufficient to say, within a year after the Louisiana Purchase was made, Congress passed the Act of March 26, 1904, entitled "An Act erecting Louisiana into two territories and providing for the temporary government thereof." Section 15 of that Act provided that: "SEC. 15. The President of the United States is hereby authorized to stipulate with any Indian Tribes owning lands on the east side of the Mississippi, and residing thereon, for an exchange of lands, the property of the United States, on the west side of the Mississippi . . ."

On August 23, 1830, Andrew Jackson, then President of the United States, was to say to the Chickasaws that they could only be preserved as a Nation by consenting: ". . . to remove to a country beyond the Mississippi, which for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone."[26]

Generals Clark, Thomas, and Hinds, who, as commissioners of the United States negotiating for the removal of the Choctaws, said to them in an address at the Treaty Ground of the Choctaw Nation on November 11, 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children. * * * We shall now proceed to state the views which the General Government of the United States has at present in contemplation. It is the policy and interest of the Government to extinguish the Indian title to all the lands on this side of the Mississippi."[27]

For brevity it need only be added that the Indian Removal Act of 1830 making it lawful for the President of the United States to cause so much of any territory belonging to the United States west of the Mississippi River not

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[26] Senate Documents Indian Removals, 23d Congress, 1st Session. Document 512 (Vol. II) Correspondent on the subject of the Emigration of Indians, between November 30, 1831, and December 27, 1833. (Washington: Printed by Duff Green 1835) No. 245, pp. 240, 241, 242.

[27] American State Papers, Indian Affairs, Vol. II, page 741.

included in any state or organized territory and to which the Indian title had been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or Nations of Indians as he might choose to exchange the lands where they now reside and remove them there, clearly evinced a public purpose that was appropriate to the objects for which the United States held the territory.

Where Congress has granted lands underlying navigable waters by way of carrying out public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of a state but remain unimpaired, and the rights which otherwise would pass to the state by virtue of its admission to the Union are restricted or qualified accordingly.

This Court said in *Holt State Bank:*

> "It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted

or qualified accordingly. Barney v. Keokuk, 94 U.S. 324, 338, 24 L.ed. 224, 228; Shively v. Bowlby, 152 U.S. 1, 47, 48, 57, 58, 38 L.ed. 331, 348, 349, 352, 14 Sup. Ct. Rep. 548; Scott v. Lattig, 227 U. S. 229, 242, 57 L.ed 490, 496, 44 L.R.A. (N.S.) 107, 33 Sup. Ct. Rep. 242; Seattle v. Oregon & W.R. Co., 255 U.S. 56, 63, 65 L.ed. 500, 506, 41 Sup. Ct. Rep. 237; Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 83-85, 67 L.ed 140, 144, 145, 43 Sup. Ct. Rep. 60."

The court below said:[28] "From a practical standpoint the equal footing principle must be recognized and maintained. There is no place in our federal system for a second class state." Unquestionably the conclusion of the court below makes the "equal footing" doctrine so inelastic that it would not admit of any exceptions. But the court below's conclusion is inconsistent with its acknowledgment[29] of the exceptions to the "equal footing" doctrine reflected in *Moore* v. *United States* (9 Cir.), 157 F.2d 760, *cert.* 330 U.S. 827, and in *United States* v. *Stotts* (W.D. Wash.), 49 F.2d 619, and of the several exceptions this Court cites in support of the rule so forcefully enunciated in *United States* v. *Holt State Bank.*

In *Case* v. *Toftus,* 39 F. 730, 731, Oregon (1889), an often quoted decision, the Court said of the "equal footing doctrine":

> "The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self-government, and to be admitted to an equal par-

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[28] Appendix 140a.

[29] Appendix 144a.

> ticipation in the maintenance, administration and conduct of the common or national government. * * * In the territories the national government is both sovereign and proprietor. * * * And as such sovereign or proprietor it may dispose absolutely of all of the public land in the territory whether high or low, wet or dry."

Case v. *Toftus* was decided more than a half century before Alaska became a state. But gauge the cogency of the Court's inquiries:

> Can any one say when, if ever, Alaska will be admitted into the Union, on an equal footing with Ohio, Pennsylvania, and New York? For aught that appears, it will ever be but very sparsely populated. Its commercial value is principally as a splendid preserve for fish and fur; while as a summer touring ground, and a place to get "far from the madding crowd," it is original and unequaled. Can it be possible that in the meantime the United States may not dispose of the private property in any of the "shore" of Alaska, which it purchased from Russia, but must hold it, willing or not, as trustee for some possible state or local sovereign that may arise or rule there in the far future?

It is enough to say that the conveyance of the fee title to the lands in Oklahoma to the Choctaws by the treaties of 1820 and 1830, and by the patent of 1842, and the removal of the Choctaws onto those lands were each "a public purpose, appropriate to the objects for which the United States held the Territory" and it was not cut off by the subsequent creation of Oklahoma, but remained unimpaired and the ownership of the bed of the navigable portion of the Arkansas River within its boundaries which otherwise would have passed to Oklahoma by virtue of its admission to the Union are restricted or qualified accordingly.

It cannot be said that the United States intended to reserve the bed of the navigable portion of the Arkansas either for itself or for the benefit of a hypothetical state which neither the Choctaws nor the Government ever thought would come into existence.

States entering the Union do so on an equal footing with the other states. The true constitutional equality in the sense of the "equal footing doctrine" extends, however, only to the right of each state under the Constitution to have and enjoy the same measure of local or self-government, and would be admitted to an equal participation in the maintenance, administration and conduct of the common or national government. It does not require that the new state should be admitted to any right in the soil thereof considered as property.

The "equal footing doctrine" refers to political rights of sovereignty, not economic stature or standing. Thus, this Court, speaking through Mr. Justice Douglas in the celebrated *Tidelands* case,[30] said:

> "The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See Stearns v. Minnesota, 179 US 223, 245, 45 L. ed 162, 174, 21 S Ct 73. It does not, of course, include economic stature or standing."

In its decision the court below said:[31] "Title to the riverbed in question passed to Oklahoma on admission unless prior thereto Congress disposed of the federal title for a public purpose by an action showing a clear intent to

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[30] *U. S.* v. *Texas*, 339 U.S. 709, 716, 94 L.Ed. 1222, 1226.

[31] 141a.

make such divestiture. Such intent is not definitely declared in the grant. The question is whether the surrounding circumstances make that intent very plain."

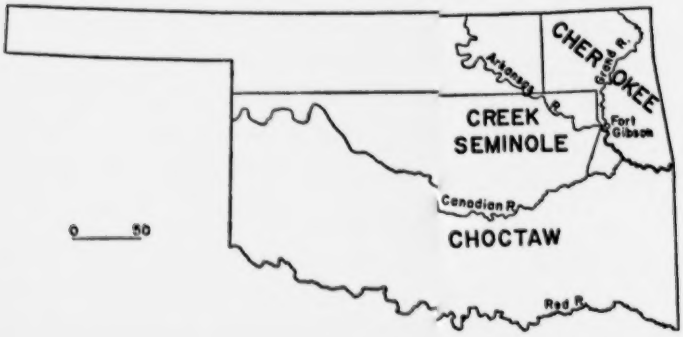
"The intent is said to be established by the agreement of the United States that no state or territory would be created in the area granted. The acceptance of this position would have widespread implications because, as we have seen, other states were created in areas covered by Indian treaties having similar provisions to those found in the Treaties of New Echota and Dancing Rabbit Creek. We believe that such provisions had to do with the exercise of political power rather than with property rights. The political aspects were changed by the Indians' acceptance of the nullification of the treaties. The property rights were unaffected by either the recognition or the nullification of the treaty provisions concerned with the creation of state or territorial governments."

The court below cited no judicial precedent for its belief. Indeed, none has been suggested in any of the briefs or in the arguments advanced by Oklahoma. This belief of the court below seems to have been borrowed from this Court's construction of the "equal footing doctrine." It parallels the language of Mr. Justice Douglas in the *Tidelands* case. But at Doak's Stand in 1820, and at Dancing Rabbit Creek in 1830, the United States on the one side, and the Choctaws on the other side, were not talking about a future state embracing the area to be ceded to the Choctaws and it entering the Union on an equal footing with other states. The converse—that the area would never be embraced in a future state—was the subject of those talks. The "equal footing doctrine" had no relation to the compact

upon which the minds of the treating parties met at Doak's Stand and at Dancing Rabbit Creek.

As the United States agreed that he area ceded to the Choctaws would not be embraced in a future state, then for what reason can it be said that the United States would have wanted to have reserved the soil and minerals underlying that short portion of the Arkansas River which is navigable within the present boundaies of Oklahoma?

The following map shows Oklahoma and the lands ceded to the southern tribes and to which they were removed from their aboriginal homes east of the Mississippi. It shows the confluence of the Grand River and the Arkansas. That strip of the Arkansas below its confluence with the Grand River was the only navigable waters in Oklahoma and is the part involved in these cases. It has been shaded more prominently to facilitate identification.



It cannot be seriously argued that this short stretch of the Arkansas River was reserved by the United States from the operation of the treaties at Doak's Stand and at Dancing Rabbit Creek as an avenue of commerce to Mexican lands

hundreds of miles overland to the west[32] or to any of the lands north of the area ceded to the Cherokees and the Creeks and Seminoles, which were also separated from it by hundreds of overland miles.

In its decision the court below consistently returned to the thesis that in treating with the Choctaws, the United States always intended that the area ceded to the Choctaws should be embraced in a future state. Thus at 145a we hear the court below saying: "It requires a clear and definite intent to convey the beds of the navigable rivers *which otherwise would pass to a state on admission.*" And, "nothing in the treaties, statutes, and conveyances establish an intent by the United States *as trustee for the states to be formed,* to convey away property *held for the benefit of the new state.*" (Emphasis supplied.)

We must inquire into the validity of the conclusion of the court below that the United States always—even as it negotiated and signed the treaties at Doak's Stand and at Dancing Rabbit Creek—intended that a state was to be formed in the lands ceded to the Choctaws and that it was holding the bed of the navigable portion of the Arkansas in that area for the benefit of the hypothetical future state.

John C. Calhoun, the Secretary of War of the United States, urging the Choctaws to retrocede to the United

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[32] Oklahoma was then on the western frontier of the United States. Beyond it lay Mexico. Mexico gained its independence from Spain in 1821. Texas gained its independence from Mexico in 1836 and entered the Union in 1845.

The treaty with the Choctaws of September 27, 1830, at Dancing Rabbit Creek, described the lands conveyed to the Choctaws as, "beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, thence to the source of the Canadian fork; *if in the limits of the United States, or to those limits . . .*"

States that part of their lands lying in Arkansas, said to their delegation in Washington in 1824: *"There is no probability that any State or territory will be erected to the west of the Arkansas territory . . ."*[33] Two months later Calhoun's negotiations with the Choctaw delegation in Washington resulted in the Treaty of 1825,[34] which established the permanent boundary line between the United States and the Choctaws and in which the United States agreed in reference to such line that it would ". . . *prevent future settlements from being made on the west thereof.*"

On November 11, 1826, at the Treaty Grounds of the Choctaws, General William Clark, General Thomas Hinds, and General John Coffee said to them: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi *into which they do not intend that their white settlers shall extend.* This is the country in which our father the President intends to settle all his Red Children."

In urging the Chickasaws to move to the west, President Jackson said to them in August, 1830, at Franklin, Tennessee: "Peace invites you there, annoyances will be left behind; *within your limits no State or territorial authority will be permitted.*"

Jackson's Secretary of War, John H. Eaton, and General Coffee were with him at Franklin, Tennessee. On his instructions they proceeded on to Dancing Rabbit Creek in Mississippi where they met with the Choctaws on Sep-

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[33] 7 Stat. 234, Proclamation, February 19, 1825.

[34] American State Papers, Vol. II, pages 549-550.

tember 15, 1830. On September 18th, they exhorted the Choctaws to move to the country west of the Mississippi, pledging to them that out of the lands to be ceded them, west of the Mississippi, ". . . *no State or Territory will be created . . .*"[35]

Article IV of the treaty concluded with the Choctaws at Dancing Rabbit Creek on September 27, 1830, was a result of these pledges. It provided that:

> "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People by jurisdiction and government of all the persons and property that may be within their limits west, so that no territory or State shall ever have the right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that *no part of the land granted to them shall ever be embraced in any Territory or State; . . .*"

There has never been a decision in any court of record concerning the ownership of the navigable portion of the Arkansas River in which either the Choctaw or Chickasaw Nations were parties. There has never been a decision by any court involving the ownership of the navigable portions of the bed of the Arkansas River in which the ownership of the Choctaw Nation or the effect of the Treaties at Doak's Stand or Dancing Rabbit Creek on the ownership of the soil underlying the navigable portion of the Arkansas was raised or taken into consideration. This is the first forum in which the Choctaw and Chickasaw Nations have had an opportunity to be heard.

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[35] Senate Documents Indian Removals 23d Congress, 1st Session, Document 512. American State Papers, Indian Affairs, Vol. II, page 257.

In the courts below, Oklahoma relied heavily upon the decisions of its Supreme Court in *State* v. *Nolegs*, 139 Pac. 943; *Vickery* v. *Yahola Sand and Gravel*, 12 P.2d 881. Each of these cases is predicated upon the conclusion of the Supreme Court of Oklahoma, that notwithstanding its treaties with the Choctaws, the bed of the navigable portion of the Arkansas ". . . was retained and held by the United States in trust for the future state and upon admission of the State of Oklahoma to the Union in 1907, the title thereto vested and became the property of the State of Oklahoma."

In *State* v. *Nolegs*, Oklahoma brought an action to quiet title to an island in the Arkansas River against Nolegs, a member of the Osage Tribe of Indians. The Jim Crow Oil Company intervened.

The Oklahoma Court held that the ownership of the navigable water and soil under them and all of the territory embraced in the Louisiana Purchase was held in trust by the Federal Government for the benefit of future states, and, as each of the states was created, the same, within the boundary of such state, passed to it, and the absolute right to the navigable waters and the soil thereunder was in the State of Oklahoma. Apparently the decision of the court was influenced by an incident which occurred in March, 1908, in which the United States Indian Agency had been asked to enter into a contract for taking sand and gravel from the Arkansas within the limits of the Cherokee Nation. At that time there were other contracts for taking sand and gravel from the Arkansas. It was contended that after statehood neither the Cherokee Nation nor the Department of the Interior had further jurisdiction to the matter and that the contractors should no longer

be required to pay them royalty for sand and gravel taken from the navigable portion of the Arkansas. The acting commissioner of Indian Affairs held that the warranty deeds, by virtue of which the sand and gravel was being removed, became void upon Oklahoma becoming a state because, as he said: "In other words, when the United States conveyed by warranty deed the lands occupied by Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the bed of the navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall."

In the early 1930's, an action was commenced by one Vickery against the Yahola Sand and Gravel Company in which one of the issues was the ownership of the bed of the Arkansas. After an appeal was perfected to the Supreme Court of Oklahoma (158 Okla. 120, 12 P.2d 881), the State of Oklahoma *ex rel* the Commissioners of the Land Office intervened. In its opinion, the court acknowledged the validity of the rule in *Shively* v. *Bowlby*[36] that Congress has the power to make grants of land below the high-water mark of navigable waters in any territory of the United States where it becomes necessary to do so in order to carry out the public purposes (second column of page 883). But then (the latter part of first column of page 885) the court reasoned that it would be far better for the Cherokees ". . . that the title to the navigable portions of the Arkansas be kept and held in the United States for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the land so granted to them."

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[36] 152 U.S. 1.

The Treaty of Dancing Rabbit Creek, September of 1830, was negotiated by the Secretary of War, John H. Eaton, and General John Coffee, for and in behalf of the United States, with Greenwood LeFlore, Moshulatubbee, and Nitakechi, for the Choctaws. We can imagine the following conversation between Mr. Eaton for the United States and Moshulatubbee for the Choctaws at the signing of the treaty:

Mr. Eaton: The treaty is ready for our signatures, and there is nothing wrong with what has been written, but I now see that an important provision has been omitted.

Moshulatubbee: What is that?

Mr. Eaton: There should be a provision in the treaty that the United States reserves the ownership of the sands and soils in the bed of the Arkansas River.

Moshulatubbee: Why in the world would you want a long strip of sand and soil in the heart of the Indian country?

Mr. Eaton: The Arkansas is a navigable river, and it has long been the policy of the United States to reserve the beds of navigable rivers for future states.

Moshulatubbee: But, you forget that this treaty provides that no state or territorial government shall ever be established along the lands that you have granted us, and the Cherokee treaty to the north contains a like provision.

Mr. Eaton: But we need this provision. The War Department through its engineers needs to remove the stumps from the river so we can get our boats up to Fort Gibson.

Greenwood LeFlore: But in Article IV you have provided that the laws passed by the Choctaws' National Council shall be not inconsistent with the Constitution, treaties and laws of the United States, and your power to regulate commerce is enough for your purpose without ownership of the riverbed.

United States v. Holt State Bank is not a relevant precedent because, without any qualifying words, the Government conveyed to the Choctaws a fee-simple title to the lands ceded to them in what is now Oklahoma and further guaranteed ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

On discovery of the American continent, the principle was asserted and acknowledged by all European nations that discovery followed by actual possession gave title to the Government, by whose subject and authority it was made, not only against other European governments, but against the natives themselves.[37]

In the United States, the right of the European discoverers, having been succeeded to by the states or by the Federal Government, the Indian title to land is a right of possession and occupancy, the fee being in the Federal Government.[38] However, under the Constitution the United States has the power to convey a fee-simple title to Indian Tribes.[39]

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[37] *Butts* v. *Northern Pacific Railway*, 7 Sup.Ct. 100, 119 U.S. 55; *Beecher* v. *Wetherby*, 95 U.S. 517.

[38] *U. S.* v. *Santa Fe Pacific Railway Company*, 314 U.S. 339, 312 U.S. 695; *M. K. & T. Railway Co.* v. *U. S.*, 235 U.S. 37.

[39] *Hynes* v. *Grimes Packing Company*, 337 U.S. 86, 103, 104.

In *United States* v. *Holt State Bank*[40] the fee was in the United States, the Indians having only a right of occupancy. In the case at bar, however, the fee was in the Choctaws. This significant fact interdicts *United States* v. *Holt State Bank*.[41]

The claim of the Choctaws in the case at bar is bottomed on the premise that, by the treaties of 1820 and 1830, and the patent of 1842, they became the owners of the fee-simple title to the lands ceded to them in what is now Oklahoma, and in making the grant to them the Government guaranteed that the area would never be embraced by any State or Territory. *Conversely, United States* v. *Holt State Bank* is bottomed on the premise that the fee to the lands involved there was vested in the Government, the Indians having only a right of occupancy,[42] and that the area would be embraced by a future state.

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40 270 U.S. 49, 70 L.Ed. 465.

41 The case at bar deals with the construction of Article II of the Treaty entered into with the Choctaws at Dancing Rabbit Creek on September 27, 1830 (7 Stat. 333), which provides: "The United States under grant especially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of the country west of the Mississippi river *in fee simple . . .*" *United States* v. *Holt State Bank* dealt with the Chippewa treaty entered in the City of Washington on February 22, 1855 (10 Stat. 1165), the first article of which provided: "And the said Indians do hereby fully and entirely relinquish and convey to the United States any and all right, title and interest, of whatever nature the same may be, which they may now have, and to any other lands in the Territory of Minnesota or elsewhere."

42 The Court observed at 270 U.S. 58, 70 L.Ed. 470: "The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. Minnesota v. Hitchcock, 185 U.S. 373, 389, 46 L.Ed. 954, 963, 22 Sup.Ct. Rep. 650."

In *United States* v. *Holt State Bank* the Indian tribe was the grantor. The Government was the grantee. The Court noted[43] that when the Indian tribe made the cession to the Government: "There was no formal setting apart of what was not ceded . . ." The Court is there saying that the Chippewas were the grantors and had they wanted to keep the soil and the minerals underlying Mud Lake, they should have formally set them apart from their cession.

This Court, in reviewing the treaties between the Chippewas and the United States, did not find in *United States* v. *Holt State Bank:* ". . . anything evidencing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future state."[44]

The *sine qua non* of Minnesota's ownership of the soil and minerals underlying Mud Lake are: *First,* the lands were not ceded by the United States to the Chippewas. The reverse was true. The Chippewas ceded the land to the United States without any reservation except the right of occupancy. *Second,* the Chippewas having ceded the lands to the United States prior to Minnesota becoming a State, the policy of treating lands underlying navigable waters for the benefit of future states became applicable.

But the absolute prerequisites to Oklahoma's ownership of the soil and minerals underlying the navigable portion of the Arkansas River within its borders are missing from the case at bar. For here, without qualifying words, the United States had conveyed to the Choctaws the fee-simple

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[43] First column, 70 L.Ed. 470.

[44] 270 U.S. 58, 70 L.Ed. 470.

title to their lands in what is now Oklahoma. And here the policy of retaining the bed of navigable streams in those lands for the benefit of a future State has no application because the United States had by treaty specifically guaranteed the Choctaws *"that no part of the lands granted to them shall ever be embraced in any Territory or State"* (Article IV of the Treaty of 1830).

Paraphrased to reflect the facts in the case at bar, *United States* v. *Holt State Bank* would have read:

> The United States was the grantor of the patent of 1842 conveying to the Choctaws, without any qualifying words, the fee-simple title to their lands in what is now Oklahoma. *There was no formal setting apart of what was not ceded.* The guarantee given by the United States in its treaties with the Choctaws that no part of the lands granted to them shall ever be embraced in any Territory or State *evinced a purpose to depart from the established policy of treating such lands as held for the benefit of a future state.*

Had this Court been addressing itself to the facts in the case at bar, it would have said in *United States* v. *Holt State Bank* that, as the Government was the grantor of the lands in what is now Oklahoma and the Choctaws were the grantees, and that it was not intended in either 1820 or 1830 that the lands should be embraced in a future State or Territory, if the Government had wanted to keep the soil and the minerals underlying the navigable streams in those lands, it should have formally set them apart from its grant.

In effect the court below's construction of Northern Pacific Railway Company v. Soderberg, 188 U.S. 526, 534 and Caldwell v. United States, 250 U.S. 14, 20, vitiates Choctaw Nation v. United States, 119 U.S. 1, 27, 28, 31 L.Ed. 315, Jones v. Meehan, 117 U.S. 1, 10, 11, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883 and the stipulation in the last sentence of Article XVIII of the Treaty concluded at Dancing Rabbit Creek in 1830 that ". . . in the construction of this treaty wherever well-founded doubt shall arise, it shall be construed most favorably to the Choctaws."

In its opinion, the court below said:[45] "We recognize that an Indian treaty is to be liberally construed in favor of the Indians as unlettered people understood it and as justice and reason demand when the strong assert power over those to whom they owe care and protection. Another rule of construction is that in a grant by the sovereign nothing passes by implication.", citing *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States*. The court below then said: "*Holt State Bank* extends this rule to a situation relating to Indian lands and the equal footing-implied trust doctrine. Although *Holt State Bank* did not deal with a claim presented by Indians and although the United States is not a party to this case, we believe that the rule announced in that decision must apply. *It requires a plain and definite intent to convey the bed of navigable rivers which otherwise would pass to a state on admission.* * * * Nothing in the treaties, statutes or conveyances establishes an intent by the United States, *as trustee for states to be formed*, to convey away property held for the benefit of the new states." (Emphasis supplied.)

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[45] 145a.

The pith of the decision of the court below is that a construction of the treaties of 1820 and 1830 must be adopted which would have supported a claim of the United States to the soil and minerals underlying the navigable portion of the Arkansas River in the area ceded to the Choctaws if that claim had been asserted immediately after the signing of those treaties.

The court below thus placed this Court's decisions in *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States, vis-avis* its decisions in *Choctaw Nation* v. *United States, Jones* v. *Meehan, Choctaw Nation of Indians* v. *United States, Winters* v. *U. S.*, 207 U.S. 564, 576, 577, *Worcester* v. *Georgia*, 6 Pet. 515, 582, 8 L.Ed. 483, 508, *Carpenter* v. *Shaw*, 280 U.S. 263.

Northern Pacific Railway Company v. *Soderberg* was a bill filed by the railway company to enjoin Soderberg from taking granite from land of which he had taken possession under a mineral location and for an accounting of the granite quarried or removed. The railway company alleged its incorporation under the Act of July 2, 1864 (13 Stat. 365) and the grant to it by that Act of every alternate odd-numbered section of public land, not mineral, and to the amount of twenty alternate sections per mile on each side of the line when passing through the territories. The bill further alleged that the principal value of the land in dispute consisted of a ledge of granite; that in 1898, Soderberg entered upon the land and began to quarry and remove the granite under a mineral location. Soderberg answered that the lands were mineral in character, and as such excepted from the Act.

The construction of that grant was governed by the general rule— ". . . that grants from the sovereign should receive a strict construction,—a construction which would support the claim of the government rather than that of the individual."

Caldwell v. *United States* was an action brought by Caldwell to recover the value of certain timber cut from the public lands of the United States in the State of Colorado.[46] Caldwell based his right of recovery upon contracts with the Denver, Northwestern and Pacific Railway Company which had been given the right by the Act of Congress of March 3, 175 (18 Stat. 482), to take from the public lands adjacent to its line, timber necessary for the construction of its railroad. Under contract with the railway company, Caldwell moved from lands adjacent to the railroad approximately 88,000 ties and delivered them to the company. After the ties were moved, a large amount of "tie slash" was left. Caldwell attempted to sell about 200 cars of "tie slashes" to the Frazier River Timber Company and to the Leyden Coal Company to be used as mining props. Officers of the Forest Service refused to allow Caldwell's transferees to have a large portion of the "tie slash" of which they took possession and sold, the proceeds being placed in the treasury of the United States. Caldwell then brought that action to recover the sums paid into the treasury of the United States claiming that there was no provision in the Act of March 3, 1875, for disposition of what remained of trees after portions of them had been

[46] Called "tie slash" and "tie slashing," the term being used to describe the tops of trees, the bodies of which had been used for making railroad ties.

used for making ties for railroad purposes. He argued that the railroad company was entitled to the "tie slash" as incident to its right to cut under the Act of Congress. This Court held that grants such as the one given by the Act of March 3, 1875, must be construed favorably to the Government; that nothing passed but that which was conveyed in clear and explicit language—inferences being resolved, not against, but for, the Government.

The facts in the case at bar are not faintly suggestive of those in *Northern Pacific Railroad Company* v. *Soderberg or Caldwell* v. *United States*. For the United States stipulated by the last sentence in Article XVIII of the treaty concluded at Dancing Rabbit Creek in 1830, that:

> "... in the construction of this treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws."

This provision reflects the policies established by both the Government and the courts before the Treaty at Dancing Rabbit Creek and followed without exception since. Thus, we hear this Court saying in *Choctaw Nation* v. *United States*, 119 U.S. 1, 27, 28, 30 L.Ed. 315 (1886):

> "It had accordingly been said in the case of Worcester v. Georgia, 6 Peters, 582 (3 U.S. bk. 8, L.ed. 508): 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.'

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorized the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

"The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations. And it is the treaties made between the United States and the Choctaw Nation, holding such a relation, the assumptions of fact and of right which they presuppose, the acts and conduct of the parties under them. The rule of interpretation already stated, as arising out of the nature and relation of the parties, is sanctioned and adopted by the express terms of the treaties themselves."

And again, in 1943, in *Choctaw Nation of Indians* v. *United States,* 318 U.S. 423, 431, 432, 87 L.Ed. 877, 882, 883:

"Of course treaties are construed more liberally than private agreements, and to ascertain their mean-

ing we may look beyond the written words to the history of the treaty, the negotiations and the practical construction adopted by the parties. Factor v. Laubenheimer, 280 US 276, 294, 295, 78 L.ed. 315, 324, 325, 54 S.Ct. 191, Cook v. United States, 288 US 102, 112, 77 L.ed. 641, 646, 53 S.Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'In a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' Tulee v. Washington, 315 US 681, 684, 685, 86 L.ed. 1115, 1119, 1120, 62 S. Ct. 862. See also United States v. Shoshone Tribe, 304 US 111, 116, 82 L.ed. 306, 315, 7 S. Ct. 75."

In *Jones* v. *Meehan*, 175 U.S. 1, 10, 11, this Court said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by respresentatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to

learned lawyers, but in the sense in which they would naturally be understood by the Indians."[47]

The court below's construction of *Northern Pacific Railway Company* v. *Soderberg* and *Caldwell* v. *United States* vitiates the rule enunciated by this Court in *Choctaw Nation* v. *United States,* 119 U.S. 1; *Jones* v. *Meehan,* 117 U.S. 1; *Choctaw Nation of Indians* v. *U. S.,* 318 U.S. 423; *Worcester* v. *Georgia,* 6 Pet. 515; *Carpenter* v. *Shaw,* 280 U.S. 263, and the provisions in the treaty of September 27, 1830, with the Choctaws that ". . . in the construction of this treaty wherever well-founded doubt shall arise it shall be construed most favorably to the Choctaws."

The thesis that references to the Arkansas River in the Treaties of 1820, and 1830, are for the purpose of establishing reference points, monuments or boundaries is tenable only if by those treaties the United States intended to retain the ownership of the navigable portion of the Arkansas River in trust for a future state.

By Article II of the treaty concluded at Doak's Stand on October 18, 1820, the United States ceded to the Choctaws a tract of land bounded as follows: "—beginning on the Arkansas River, where the lower boundary line of the Cherokee strikes the same; thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River three miles below the mouth of Little River which empties into Red River on the north side; thence a direct line to the beginning."[48]

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47 Of the 176 signatories on behalf of the Choctaw Nation, 166 signed by mark.

48 7 Stat. 210, Proclamation, January 8, 1821.

In its opinion,[49] the court below said: "We agree with Oklahoma that references to the Arkansas River are for the purpose of establishing reference points, monuments or boundaries. They do not indicate an intent, much less a clear intent, to convey the riverbed."

It is respectfully submitted that this conclusion of the court below is at sixes and sevens with the well-established rule that where the United States owns the bed of a non-navigable stream and the upland of one or both sides, it is free when disposing of the upland to retain all or any part of the riverbed; and whether, in any particular instance, it has done so, is essentially a question of what is intended. If its intention is not otherwise shown it will be taken to have assented that its conveyance of the upland operate as a conveyance of the riverbed. *United States* v. *Arizona*, 295 U.S. 1, 79 L.Ed. 1267, 55 Sup. Ct. 610; *Wilcox* v. *Jackson*, 13 Pet. 498, 516, 517, 10 L.Ed. 264, 273; *Irvine* v. *Marshall*, 20 How. 558, 15 L.Ed. 994; *Gibson* v. *Chouteau*, 13 Wall. 92, 99, 20 L.Ed. 534, 536; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404, 61 L.Ed. 791, 816, 37 Sup. Ct. Rep. 387; *Kean* v. *Caulment Canal & Improv. Co.*, 190 U.S. 452, 460, 47 L.Ed. 1134, 1137, 23 Sup. Ct. Rep. 651; *Hardin* v. *Jordan*, 140 U.S. 371, 384, 35 L.Ed. 428, 434, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U.S. 406, 413, 414, 35 L.Ed. 442, 445, 11 Sup. Ct. Rep. 819, 840; *Grand Rapids & I.R. Co.* v. *Butler*, 159 U.S. 87, 92, 40 L.Ed. 85, 87, 15 Sup. Ct. Rep. 991; *Hardin* v. *Shedd*, 190 U.S. 508, 519, 47 L.Ed. 1156, 1157, 23 Sup. Ct. Rep. 685; *Whitaker* v. *McBride*, 197 U.S. 510, 512, 515, 516, 49 L.Ed. 857, 860-862,

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[49] 144a.

25 Sup. Ct. Rep. 530; and see *St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 287, *et seq.*, 19 L.Ed. 74, 78.

It would be a curious thing indeed to construe the term "up the Arkansas" to mean "up the south bank of the Arkansas to the point where it becomes non-navigable and from that point up the north bank." Such a thesis could only be sustained if the United States and the Choctaws had agreed by the treaties of 1820 and 1830 that the territories conveyed to the Choctaws were to become embraced in a future state, in which event, of course, the bed of the navigable portion of the Arkansas would then have been held by the United States in trust for the benefit of the future state. Since it is plainly evident that it was not the intent of the United States and the Choctaws at the time they made the treaties of 1820 and 1830 that the lands ceded to the Choctaws should become a part of a state, that thesis is not tenable.

At the most, by the Treaty of 1830, the United States only reserved a navigation easement on the Arkansas River.

Oklahoma has contended that, as the Treaty of 1817 established the southern boundary of the Cherokees on the north bank of the Arkansas, the first sentence of Article XI of the Treaty of 1830 with the Choctaws which provided: "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duties than citizens of the United States," established the south bank of the Arkansas as the northern boundary of the Choctaw lands. Thus, syllogized the State, the Government never ceded the bed of the river itself.

What Oklahoma has done is this: It has excerpted one sentence from Article XI and attempted to have it read out of context. The whole of the Article reads:

> "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U. S. It is agreed further that the U. S. shall establish one or more Post Offices in said Nation, and may establish such military post roads, and posts, as they may consider necessary."

In construing a treaty all provisions relevant to the matter under consideration must be considered[50] and, where reasonably possible, meaning should be given to all the words.[51] A treaty should be construed in the light of the circumstances existing at the time it was entered into[52] and the objects that the parties were desirous of effecting.[53] Furthermore, where the meaning of a treaty is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties with respect to the subject matter.[54]

When Article XI is construed as a whole, it is evident that the treaty signatories intended that the Government should reserve a right to establish post offices and military

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[50] *Perkins* v. *E.L.G.*, 59 S.Ct. 884, 307 U.S. 325, 83 L.Ed. 1320.

[51] *Factor* v. *Laubenheimer, supra.*

[52] *Pigeon River Imp. Slide & Boom Co.* v. *Charles W. Cox, Ltd.*, 54 S.Ct. 361, 291 U.S. 138, 78 L.Ed. 695.

[53] *Rice* v. *Sioux City Memorial Park Cemetery*, 60 N.W.2d 110, *dismissed* 75 S.Ct. 614, 349 U.S. 70, 90 L.Ed. 897.

[54] *Choctaw Nation of Indians* v. *United States*, 63 S.Ct. 672, 318 U.S. 423, 87 L.Ed. 492.

posts and such easements over streams and over land as might be convenient to the operation of post offices, the supplying of military posts and the bringing of supplies and commodities into the Choctaw country.

It will be remembered that the removal of the Indians from the southern states to the lands west of the Mississippi was a concerted effort. The Cherokees had moved west of the Mississippi into lands in Arkansas in 1817, just a few years before the Choctaws. The last sentence of Article V of the Treaty of 1817 with the Cherokees provided ". . . the United States reserving the right of establishing factories, a military post, and roads, within the boundaries above defined." And Article IX of that treaty provided: ". . . that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein." Those terms, in the treaty with the Cherokees in 1817 are, for all practical purposes, the same as Article XI of the treaty with the Choctaws in 1830.[55]

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[55] A similar provision was found in many other Indian Treaties. In a Treaty with the Cherokees approved July 2, 1791, 7 Stat. 39, 2 Kappler 22, a Cherokee boundary was established in Article V of the Treaty which reads as follows:

> "It is stipulated and agreed, that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the Tennessee river."

In a Treaty with the Six Nations of November 1794, 7 Stat. 44, 2 Kappler 28, lands were involved along Lake Ontario and Lake Erie. Article V of this treaty provides with reference to roads, rivers, and harbors, as follows:

> "And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining and within

It will be noted from the start that the sentence from Article XI, upon which the State has placed so much reliance, covers all streams wherever they might be located within the Choctaw lands. It neither singled out nor limited its operation to the Arkansas.

In 1830, very little was known about the rivers in the lands ceded to the Choctaws. Many had not been surveyed and very few had been traveled their full length. From later exploration and travel it became known that the Arkansas was the only navigable river within the lands ceded to the Choctaws. The use of the all inclusive term "navigable streams shall be free to the Choctaws" is just another way of repeating the terms of the treaty with the Cherokees ". . . that nothing in the foregoing articles shall be construed so as to prevent any of the parties so contracting from the free navigation of all the waters mentioned therein."

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55 (Continued)

their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety."

In a Treaty with the Sac and Foxes of November 3, 1804, 7 Stat. 84, 2 Kappler 54, the Indians gave the United States permission to establish a military post either on the upper side of the Ouisconsing or on the right bank of the Mississippi, and did further agree:

". . . that they will at all times allow to traders and other persons travelling through their country under the authority of the United States a free and safe passage for themselves and their property of every description. And that for such passage they shall at no time and on no account whatever be subject to any toll or exaction."

A Treaty with the Creeks, November 14, 1805, 7 Stat. 96, 2 Kappler 62, reads as follows:

"And it is also agreed on the part of the Creek nation, that the navigation and fishery of the Ocmulgee, from its junction with the

Viewed against the background of the concerted effort to remove all Indians out of the southern states and onto lands west of the Mississippi, together with the manifested desire of the Government to treat all Indian tribes equally, it is apparent that, in its treaty with the Choctaws, the Government was reserving nothing more than it had in the treaty with the Cherokees; that is, "free navigation of all of the waters mentioned therein."

In the light of the circumstances existing at the time the treaty with the Choctaws was entered into and the objects that the Government and the Choctaws were desirous of effecting, it is obvious that the Government had no need of anything but a navigation easement on the streams in

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55 (Continued)

Oconee to the mouth of the Ulcofauhatchee, shall be free to the white people; provided they use no traps for taking fish; but nets and seines may be used, which shall be drawn to the easterly shore only."

By a Treaty with the Cherokees of March 22, 1816, 7 Stat. 139, 2 Kappler 87, the United States was granted the free use of certain roads through the Cherokee nation for intercourse between the states of Tennessee and Georgia and Mississippi Territory. Article 2 of the treaty then went on to provide that:

". . . the citizens of the United States shall freely navigate and use, as a highway, all the rivers and waters within the Cherokee nation. The Cherokee nation further agree to establish and keep up, on the roads to be opened under the sanction of this article, such ferries and public houses as may be necessary for the accommodation of the citizens of the United States."

Article III of a Treaty of peace between the United States of America and the tribes of Indians, called the Wyandots, Delawares, Shawanoes, Ottawas, Chippewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias, of August 3, 1795, 7 Stat. 49, 2 Kappler 30, reads:

"And the said Indian tribes will also allow to the people of the United States the free use of the harbors and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety."

the Choctaw lands. It did not need the bed of streams that would re-emerge by avulsion. It did not need the minerals that might underlie the beds of the streams in the Choctaw lands. It did not need to reserve the soil of the beds of navigable streams and the minerals underlying them in trust for a future state because it had guaranteed to the Choctaws ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

Indeed, if the Choctaws had traded the United States the bed of the streams within its tribal domain east of the Mississippi and the minerals underlying them, then, by the same token, the United States was, by its treaty, trading to the Choctaws the beds of all of the streams and the minerals underlying them in the lands ceded to them west of the Mississippi. To say otherwise is to say that the Government was seeking an advantage for itself. This it did not intend to do. The Court said in *United States* v. *Shoshone Tribe of Indians.*[56]

> "In treaties made with them the United States seeks no advantage for itself."

Finally, it must be remembered that by Article XVIII of this treaty the Government agreed ". . . that in the construction of this treaty wherever well founded doubt shall arise, it shall be construed most favorably towards the Choctaws." The construction of this provision most favorable to the Choctaws is that, as with the treaty a few years earlier with the Cherokees, the Government retained only an easement for the "free navigation of all of the waters mentioned therein."

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[56] 58 S.Ct. 794, 304 U.S. 111, 116, 117, 82 L.Ed. 1218, 1219.

CONCLUSION

The removal of the Indians from the southern states to the lands west of the Mississippi was a purpose appropriate to the objects for which the United States held the territory. General Clark, General Thomas, and General Hinds, who, as commissioners for the United States negotiating for the removal of the Choctaws from Mississippi, demonstrated the appropriateness of that purpose when they said to them in an address at the treaty ground of the Choctaw Nation in 1826: "The United States have a large unsettled and unappropriated country on the west side of the great river Mississippi, into which they do not intend that their white settlers shall extend. This is the country in which our father the President intends to settle all of his Red children."

The "Indian Removal Act" of May 28, 1830, making it ". . . lawful for the President of the United States to cause so many of any territory belonging to the United States, west of the river Mississippi, not included in any State or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided unto a suitable number of districts, for the reception of such tribes of Nations of Indians as may choose to exchange the lands where they now reside and remove there . . ." was a proper method through which the United States accomplished a purpose appropriate to the object for which it held the territories.

It is settled law that Congress has the power to make grants of land below the high-water mark of navigable rivers in any territory of the United States to carry out public purposes appropriate to the objects for which the

United States held the territory (*Brewer-Elliott Oil and Gas Co.* v. *United States*, 260 U.S. 77, 84). It is equally well settled that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands for the purpose of carrying out purposes appropriate to which the objects for which the territory was held, such rights are not cut off by the subsequent creation of a State, but remain unimpaired, and the rights which otherwise would have passed to the State by virtue of its admission into the Union are restricted and qualified accordingly. (*United States* v. *Holt State Bank*, 270 U.S. 49, 54, 55, 70 L.Ed. 465, 468.)

John C. Calhoun's pledge to the Choctaw delegation in Washington in 1824 "There is no probability that any State or territory will be erected to the west of the Arkansas territory;" the provision in the Treaty of 1825 establishing the western boundary line of the present State of Arkansas by which the United States covenanted that it would "prevent future settlements from being made on the west thereof;" the pledge of the United States given to the Choctaws through its commissioners, General Clark, General Hinds, and General Coffee in 1826, that there the United States would "guard you against all enemies, whether they be white or red; and no State or territory will be created;" the promise of the President, Andrew Jackson, to the Chickasaws at Franklin, Tennessee, on August 23, 1830, that "The United States would give them a grant for lands which should endure as long as the grass grows and the water runs" and "within your limits no State or Territorial authority will be permitted;" the assurance that Secretary Eaton and General Coffee gave to the

Choctaws at Dancing Rabbit Creek in Mississippi on September 18, 1830, that "there your great Father can be your friend; and he can keep the white man's law from interrupting and disturbing you; and there, too, he will guard you against all enemies whether they be white or red. There no State or Territory will be created;" and the solemn declaration of the United States in Article IV of the Treaty of September 28, 1830, "That no part of the lands granted to them shall ever be embraced in any territory or State" leaves no room for it to be said that when the United States signed the treaties with the Choctaws it intended that the lands conveyed to the Choctaws would be embraced in a state or that it intended to reserve the soil and the minerals under the bed of the navigable portion of the Arkansas for the benefit of a future state.

The decisions of the Supreme Court of Oklahoma in *State* v. *Nolegs* and *Vickery* v. *Yahola Sand and Gravel Company*, and of the court below, from which this appeal is taken, are all bottomed upon the premise that, notwithstanding the solemn representations that the United States made to the Choctaws to induce them to exchange their home lands east of the Mississippi for the wild lands in the west, it was the intention of the United States to later embrace the area ceded to the Choctaws within a state and that intention was known and acceded to by the Choctaws. This was not so.

In construing a treaty all provisions relevant to the matter under deliberation must be considered. A treaty should be construed in the light of the circumstances existing at the time it was entered into and the objects that the parties were desirous of effecting.

If the representations and promises made by the United States to the Choctaws, that the area ceded to them would never be embraced within a future state, induced the Choctaws to sign the treaties at Doak's Stand and at Dancing Rabbit Creek, and if the meeting of the minds of the negotiating parties on that issue is reflected by Article IV of the Treaty at Dancing Rabbit Creek, then the premise upon which *State* v. *Nolegs* and *Vickery* v. *Yahola Sand and* Gravel Company is bottomed, is false.

Under this Court's decisions in *Choctaw Nation* v. *United States, Jones* v. *Meehan,* and *Choctaw Nation of Indians* v. *United States,* and the specific provision of Article XVIII, the Treaty at Dancing Rabbit Creek must be construed most favorably to the Choctaws. When this is done and that treaty is viewed against the background of the objects that the Government was desiring to effect by it and of the circumstances existing at the time it was entered into, it is obvious that the Government had no need to retain anything but a navigation easement on the streams in the lands ceded to the Choctaws.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1104

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,

Respondents.

BRIEF FOR PETITIONER

CITATIONS TO OPINION BELOW

The District Court did not write an opinion. Although the trial court did render a Pretrial Order, Amendment to Pretrial Order and Judgment, these are not reported. App. 107a-120a.* The opinion of the Court of Appeals

* A joint appendix containing all the pleadings and orders of the court has been prepared in accordance with Rule 36 for use in Nos. 976 and 1104 and references to that appendix will be cited as App. ---a. Included as part of this brief as appendix material are the pertinent treaties, patent, and other miscellaneous documents. These will be cited, for example, as App. A at ---.

for the Tenth Circuit, affirming the judgment of the lower court, was entered October 31, 1968. The case is reported at 402 F. 2d 739. App. 131a-146a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The United States Court of Appeals for the Tenth Circuit has decided that when the State of Oklahoma entered the Union in 1907, under the so-called implied trust-equal footing doctrine, the state by operation of law obtained title to the river bed underlying the navigable portion of the Arkansas River. The questions presented are:

1. Did the United States Government in 1838 impliedly reserve in trust for a future state, title to the bed of the navigable portion of the Arkansas River, under the mandate of the so-called "equal footing" doctrine when, without reservation, fee simple title to the vast area containing the river was conveyed by patent executed pursuant to valid treaty between the United States and the Cherokee Nation, as one undivided tract, the perimeters of which were described by metes and bounds, and when, the treaties with the Cherokee Nation defining the property expressly prohibited the ceded property from being included within the territorial limits or jurisdiction of any state or territory?

2. Did the Court of Appeals misconstrue and misapply the teaching of this Court in *United States v. Holt State Bank*, 270 U.S. 49, with regard to the implied trust-equal footing doctrine, in that the determination of intent to convey title to land under navigable waters can only be made after the Court has considered not only

the words of the treaty and patent but also considered the nature of the Indian title, the circumstances in which the documents were prepared, the object sought to be attained, and the prior habits and customs and needs of the tribe?

STATUTES AND TREATIES INVOLVED

The case requires an examination of three principal treaties with the Cherokee Nation.

1. The Cherokee Treaty at Washington, D. C. with the Western (Old Settler) Cherokees dated May 6, 1828 [7 Stat. 311], proclaimed May 28, 1828;

2. The Cherokee Treaty at Fort Gibson with the Western (Old Settler) Cherokees dated February 14, 1833 [7 Stat. 414], proclaimed April 12, 1834;

3. The Cherokee Treaty at New Echota, Georgia, with the Cherokee Nation dated December 29, 1835 [7 Stat. 478], proclaimed May 23, 1836;

4. Patent executed by President Martin Van Buren, dated December 31, 1838.

See Appendices A, B, C, and D, *infra.*

STATEMENT OF THE CASE

1. Proceedings Below

In December, 1966, the Cherokee Nation filed an action in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma, the Commissioners of the Land Offices of the State of Oklahoma, and the holders of various mineral leases which, in general terms, sought to (1) recover from the

State of Oklahoma and the Commissioners of the Land Office judgment for all monies heretofore by them collected, and (2) compel the State and Commissioners of the Land Office to pay to the United States, for the use of the Cherokee Nation, all monies derived from bonuses, rentals, and royalties from said leases which the defendants now hold and (3) obtain judgment against the said corporate and other defendants requiring them to pay all future royalties derived from their respective leases to the United States of America as Trustee for the tribe, and (4) restrain each and every defendant from interfering in any manner or form with the rights of the tribe, to the land underlying the bed of the Arkansas River from the point of confluence of the Grand River (sometimes known as the Neosho River and the Neosho Grand River) to the confluence of the Canadian River and the northerly half of the river bed from that point to the Oklahoma-Arkansas border. App. 12a-14a. The Cherokee Nation asserted that the land in question had been granted to the tribe by the United States pursuant to the treaties of 1828, 1833, and 1835 and the patent of 1838 whereby the Cherokee Nation obtained fee simple title to the entire area described, without reservation or exception. The Cherokee Nation asserted title to the entire portion of the river bed above the confluence of the Canadian and north half of the river "along the center of its main channel to the state line of Arkansas." App. 7a.

The various lease holders who held the property pursuant to leases from the state filed answers. Many of the lease holders filed cross-claims against the state and counterclaims against the tribe. On February 1, 1967, the State of Oklahoma filed its answer and counterclaimed to quiet title asserting that the river was navigable and that the property beneath the Arkansas River below the high water mark passed by operation of law to the state when it entered the Union.

The Choctaw and Chickasaw Nations (referred to as the Choctaws hereinafter) intervened as plaintiffs in the action claiming title to a portion of the riverbed in question on the basis of the Choctaw Treaty of Doak's Stand, October 18, 1820 [7 Stat. 210] and Choctaw Treaty of Dancing Rabbit Creek, September 27, 1830, [7 Stat. 333, Art. III]. The Choctaws and Chickasaws asserted that the United States ceded a portion of the natural bed of the Arkansas River below the high water mark to the tribes from the confluence of the Arkansas River with the Canadian River thence to the eastern boundary of the State of Oklahoma[1] when the Government established the Northern Boundary of the tribal lands. App. 106a.

The trial court on September 25, 1967, entered a Pretrial Order setting forth the issues in the case and rendering its decision. It was stipulated by all parties that the Arkansas River in the area in question was navigable; and the Court on November 15, 1967, entered its order quieting title in the state. The Court stated that the state became "by operation of law the owner of the lands comprising the bed of the Arkansas River between the high water banks from its confluence with the Grand River to the eastern boundary of Oklahoma, . . ." App. 119a.

On appeal the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court and rendered its decision asserting that the land in question passed to the State of Oklahoma upon its admission to the Union on the basis of the equal

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[1] It is this portion of the river between the Cherokee Nation and Choctaw-Chickasaw Nations which is in dispute. The Court of Appeals found it unnecessary to consider the jurisdiction of the Court over the claim of the Choctaws against the Cherokees or the validity of that claim. App. 146a.

footing-implied trust doctrine. 131a-146a. The Cherokee Nation filed its petition for certiorari on March 3, 1969, and the Court granted the petition on April 21, 1969.

2. Facts

The basis of the present claim lies in the interpretation to be placed upon the original treaties and patent establishing the Cherokee Nation in what was then Indian Territory and which is now the State of Oklahoma. The Cherokee Nation at the time of the founding of this nation owned vast tracts of land East of the Mississippi, in present day southern Virginia, Georgia, South Carolina, western North Carolina, eastern Tennessee and northeastern Alabama.[2] The Cherokee Nation either voluntarily or by force of arms was required to exchange these lands and to abandon its homeland in the east and forced to move to the far western lands of the Indian Territory.

In 1785, the tribe concluded the Treaty of Hopewell with the newly established American Nation, whereby the tribe brought itself under the protection of the United States and whereby each party agreed to respect the integrity and sovereignty of the other. The principles announced in this treaty were reasserted and reaffirmed in all subsequent treaties. Under these treaties the Cherokee Nation was guaranteed its own laws and form of government, and complete dominion and control over all the land and rivers within its domain. See *Cherokee Nation v. State of Georgia,* 30 U.S. [5 Pet.] 1, 18; and *Worcester v. State of Georgia,* 31 U.S. [6 Pet.] 515, 556.

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[2] Conservative estimates figure the total amount of acreage to be 79,986,454. Charles C. Royce, The Cherokee Nation of Indians, Fifth Annual Report of Bureau of Ethnology, Smithsonian Institute, Washington, D.C. (1883-1884, Page 378)

After the Revolutionary War white settlers moved westward and southward trespassing upon Cherokee lands and coming in contact and conflict with the Cherokees. The frontier states such as Georgia wanted the Cherokee land for their people. Consequently, these states, especially Georgia, passed laws over the Cherokee domain, thus encroaching upon and taking away tribal lands. The Cherokee Nation took the matters to Court. In *Worcester v. State of Georgia*, 31 U.S. [6 Pet.] 515, 556, Mr. Chief Justice Marshall affirmed sovereignty of the Cherokee Nation over its domain and the plenary power of Congress to deal with the Indians which power could not be abridged by the states. Nonetheless, the contact and conflict between the settlers and the Indians did not abate. The Cherokees were placed in a situation where they had little or no recourse; either move, fight, or be overrun.

In 1817 and 1819, a few members of Cherokee Nation had been induced to give up their tribal lands in the East and move westward into Arkansas. [7 Stat. 156, 195]. These Cherokees thereinafter became known as the western or "Old Settler" Cherokees.

Then in 1828, "the present location in Arkansas being unfavorable to their present repose"; Congress wanted to move the Cherokee further west, with the stated purpose of establishing:

> * * * *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State; * * *. [Emphasis in original.] App. A, *infra.*

The Old Settler Cherokees, with this promise, moved further westward beyond Arkansas and Missouri [7 Stat. 311]. Article 2 of the treaty set out by metes and bounds the precise area which would form the permanent home and future domain of the Cherokee Nation.[3] See App. A, *infra.*

The major portion of the tribe still remained in the east. In 1830 after the passage of the Indian Removal Bill [4 Stat. 411], the Government pursued a more aggressive policy of trying to move the eastern Cherokee Nation westward into the lands across the Mississippi.[4]

In 1833 the United States eliminated a conflict between the Creeks and Cherokees over the boundaries of this tribal land. By treaty [7 Stat. 414] the government corrected and fixed the respective boundaries in the subject area thus completing the isolation of these tribes. See App. B, *infra.* Pursuant to the Treaty of New Echota December 29, 1835 [7 Stat. 478], the main body of the Cherokee Nation still remaining in Georgia was moved in 1838-1839 to the new lands west of Arkansas in order to

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[3] While the treaty on its face appears to be with the Old Settler Cherokees, it is equally clear that the United States contemplated and intended this area in Indian Territory to be the home for the entire tribe, western and eastern Cherokee.

[4] In 1803 the United States acquired from France sovereign title to lands west of the Mississippi. It thereafter acquired aboriginal Indian title from the native Osages in 1825. Thereafter it began its policy of removal and isolation, whereby Indian tribes were transferred from areas inhabited by white settlers and resettled and given land separate and apart from the white man where the Indians could carry on their way of life undisturbed. In 1893 this policy was changed.

remove the last vestige of friction between the Cherokees and the settlements in Georgia.[5]

As a practical matter, after 1833 the Cherokee Nation was the treaty owner of some 7,000,000 acres of land in what is now eastern Oklahoma, including the Cherokee portion of the river bed in question, over which it exercised complete use, dominion, and control. The Treaty of 1833 as well as the Treaty of New Echota in 1835 provided for the issuance of a patent in fee simple which would confirm and manifest the Cherokee ownership to the land conveyed.

The Treaty of New Echota of 1835, incorporating the granting provisions of the earlier 1828 and 1833 treaties, again set out by metes and bounds the vast tract of land in Indian Territory which was to be the home of the Cherokee Nation. The description in Article 2 encompassed the Arkansas River in the following language:

> Thence down said Verdigris River to the Arkansas River to a point where a stone is placed opposite the east or lower bank of the Grand River at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a

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[5] See 27 Ct. Cl. 1 (1891) The *Western Cherokee v. United States*. In this case the Court sets forth with clarity the history of the Cherokee Nation. "The Eastern Cherokees were prisoners in Georgia, under the guard of 5,000 United States troops who had hunted them down from their mountains and driven them out of their valleys and were now bringing them to the terms of an enforced emigration. In 1836, the Government, apprehending collisions with the people of Georgia and weary of being thwarted in the diplomatic field, sent a military force to bring negotiations to an end and effect a forcible removal." *Id.* at 20-21. This case carefully traces the background of the Treaty of New Echota. *Id.* at 23-25.

> straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; *thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas* where this Eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas territory as now defined, . . . (Emphasis added.) App. C, *infra.*

Further, it was expressly stated in Article 5 of the Treaty of New Echota of 1835:

> The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article *shall in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.* (Emphasis added.) App. C at C-7.

During the period 1831-32 and 1836-1837, surveys of the land in question were conducted by Reverend Isaac McCoy. Subsequently in December 1838, the Cherokee Nation was issued the *first patent* in fee simple to the land ceded by the United States. The patent set out in detail the metes and bounds descriptions and the exact acreage conveyed. The description stated:

> AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to

the junction of Verdigiris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * *thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith;* thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the southwest corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a

> mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.– (Emphasis added.) App. D, *infra.*

The grant to the Cherokees in the treaties and patent was absolute and contained no exception or reservation to the land conveyed.

In 1902 the United States executed an agreement with the Cherokee Nation whereby tribal title to certain of its *allottable* land was extinguished and individual grants of allottable land were made to enrolled tribal members. [32 Stat. 716, 727, Act of July 1, 1902]. Fee title to all of the lands which were not so distributed remained vested in the Cherokee Nation under treaty and patent. The title to the bed under the navigable portion of the Arkansas River was never granted to anyone, within or without the tribe. Thereafter in 1907, the twin territories entered the Union pursuant to the Oklahoma Enabling Act [34 Stat. 267][6] upon the condition:

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[6] In the earlier Curtis Act [30 Stat. 495] June 28, 1898, § 11 provided," . . . but all oil, coal, asphalt, and mineral deposits in the

(Cont'd on p. 13)

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian tribes, * * *.

See also Oklahoma Constitution Article I, Section 3.

On the basis of these treaty and patent provisions, the Cherokee Nation asserted its claim for an accounting as fee simple owner of the land in question.

SUMMARY OF ARGUMENT

In the early 1800's the United States Government initiated a series of treaties with the Cherokee Nation culminating in the Treaty of New Echota in 1835. Under the provisions of this treaty the Cherokee Nation ceded to the United States its remaining tribal lands in the East in return for lands across the Mississippi River in Indian Territory, in what is now the State of Oklahoma. For the treaty cessions, the Cherokee Nation was granted lands in the west, evidenced by a patent executed by President Martin Van Buren in 1838. This patent explicitly granted to the Cherokee Nation fee simple title to all the land within the metes and bounds description without exception or reservation. The portion of the Arkansas River in Oklahoma was within the perimeters of the metes and bounds description, so that the title to the riverbed passed to the Cherokee Nation.

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[6] (Cont'd from p. 12)

lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry title to such oil, coal, asphalt, or other mineral deposits; and all town sites shall also be reserved to the several tribes and shall be set apart by the commission heretofore mentioned as incapable of allotment."

In its opinion, the Court of Appeals for the Tenth Circuit asserted that the United States Government had reserved title to the bed under the Arkansas River because it was a navigable river and that such title passed to the State of Oklahoma on the basis of the implied trust-equal footing doctrine articulated in *Pollard v. Hagan*, 44 U.S.[3 How.] 212. The appellate court further stated in its decision that the title to land beneath navigable waters could only have been conveyed to the Cherokee Nation by an express grant or a clear manifestation of intent to convey such land, citing *United States v. Holt State Bank*, 270 U.S. 49.

The claim of the Cherokee Nation is founded upon the express provisions of the treaties and patent involved, interpreted in the context of the special facts and circumstances which existed between the Cherokee Nation and the United States Government. These facts and circumstances manifest a clear intent to establish the Cherokee Nation as the fee simple owner of all the land within the metes and bounds description, including the bed of the river beneath the navigable portion of the Arkansas River. The Cherokee Nation had not aboriginal Indian title of use and occupancy, but fee simple title by patent executed pursuant to treaties adopted and ratified by the United States Senate, and constituting the highest law of the land.

The Court of Appeals has interpreted the implied trust-equal footing doctrine as an absolute requirement, when in the context of this case the doctrine simply is not applicable. The implied trust-equal footing doctrine has been applied in situations where the formation of a state was imminent, and when there had been no prior disposition of the fee simple title to the land. In the case here presented, it is difficult to conceive of an implied trust for a yet-to-be-formed state, when the Congress expressly provided in all the treaties with its Indian ward that *no state* would be formed in such land.

Further the state claims an implied trust against a people under the protection and care of the Government and to whom the Government owed a prior duty of trust.The implied trust-equal footing doctrine relied upon by the court was not even articulated until 1845, seven years after the issuance of the fee simple patent to the Cherokee Nation.

It has long been the rule of interpretation in construing treaties with the Indians that such treaties are to be interpreted liberally in the manner in which the Indians would naturally understand their terms, so as to give full effect to the protection of Indians. In interpreting treaties, this Court has examined the prior habits and condition of the particular Indian tribe, as well as the actual words of the treaty and the circumstances surrounding the treaties, in order to determine the intent of the parties. The Court of Appeals stated that no intent to convey the title to the land underlying the navigable portion of the Arkansas River was manifested. While the appellate court agrees that the Government can convey title to land below the high water in a navigable river, this can be accomplished only by clear and convincing actions. The unique treatment of the Cherokee Nation and the other Five Civilized Tribes clearly discloses such an intent. The issuance of a patent in fee simple and the combination of treaty and patent language demonstrates an intent to establish the Cherokee Nation as sovereign in these new lands subject only to limitations imposed by the Constitution.

The United States Government issued to the Cherokee Nation the first patent conveying fee simple title to an Indian tribe. This conveyance of fee simple title in 1838 refutes an implied reservation of title. When in 1907 Oklahoma entered the Union, the title to the riverbed under the navigable portion of the Arkansas River had not been disposed of, so that title still rests in the Cherokee Nation.

ARGUMENT

1. Title to the Riverbed Did Not Pass to the State of Oklahoma by Operation of Law Upon Its Admission to the Union

The District Court in its judgment determined that by operation law title to the land under the navigable portion of the Arkansas River passed to the State of Oklahoma upon its admission to the Union. (App. 119a). The Court of Appeals in its opinion affirmed this decision asserting that under the "implied trust-equal footing doctrine" articulated in *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230, the Government held title to the riverbed for future states that might be formed, and accordingly, the Cherokee Nation never received title to the land under the Arkansas River. The Court of Appeals rationalized its decision by stating that there was no clear and definite intent to convey the beds of navigable rivers to the tribe, as required by this Court in *United States v. Holt State Bank*, 270 U.S. 49 and no language in the treaties, statutes, or patents demonstrated such a conveyance. Further, if Congress had conveyed title to the riverbed to the Cherokee Nation, Oklahoma would not have been admitted to the Union on an equal footing with the original states; and said the court, "There is no place in our Federal system for a second-class state." App. 140a.

The Court of Appeals failed to grasp the meaning and purpose of the doctrine. The Court held, in effect, that the implied trust-equal footing doctrine is an automatic absolute rule of construction, permitting of no exceptions. See *Shively v. Bowlby*, 152 U.S. 1. This doctrine does not place upon the federal government any restraint upon its power to dispose of land to which it has title, as it deems necessary and proper. A close examination of the *Pollard* case discloses the guiding

principles underlying this constitutional rule of equality. In *Pollard* , Georgia and Virginia ceded property to be held by the United States *in trust upon the condition* that the state of Alabama be formed. Included in the territory so ceded was the Mobile River. The United States, while under this condition, attempted to grant title to the soil under the river on the ground that the United States pursuant to the Constitution had acceded to the sovereign title of the navigable waters. The Court stated that the title to the navigable waters passed to the individual states at the time of the Revolution, and these states held title subject only to the constitutional authority to regulate commerce. The federal government could not make grants of such land contrary to state grants in view of the condition of trust, for to do so would impinge upon the sovereignty, jurisdiction, and right of soil of the state of Alabama. The United States in this case could only carry out the specific trust created by the deeds of cession. Indeed, the territory of Alabama had already been designated and *statehood was imminent*. It must be noted that the land in question under the Mobile River had not been obtained by the United States by treaty from Spain or by conquest or by purchase. Title to the land under the navigable river came from the states. Under such conditions the implied trust-equal footing doctrine is operable.

In a later case also involving land under the Mobile River in Alabama, Mr. Justice Taney in *Goodtitle v. Kibbe,* 50 U.S. [9 Howard] 471, 478 emphasized that had the land in question been otherwise obtained than from the states by deeds of cession, "Undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done." See also *Knight v. United Land Assoc.*, 142 U.S. 161.

The requirement that states be admitted on an equal footing with the original states does not demand that

Courts wipe out economic diversities. In *Alabama v. Texas*, 347 U.S. 272, 275, Mr. Justice Reed plainly stated that the equal footing doctrine "does not affect Congress' power to dispose of federal property." In *Brewer-Elliot Oil & Gas Company v. United States*, 260 U.S. 77, it was stated in dicta that "there was nothing in the admission of Oklahoma into constitutional equality of power with the other states which required or permitted a devesting [sic] of the title [to land]."[7] *Id.* at 88.

The doctrine of equality is directed to the parity of political standing and sovereignty. See *Pollard v. Hagan supra; Coyle v. Smith*, 221 U.S. 559. The doctrine of implied trust-equal footing is not a bridle on the power of the federal government to transfer title to land which it owns.

The sovereign can convey title to lands under navigable waters as it deems necessary and proper. The scope of the power of Congress to transfer title to lands beneath the navigable waters was summed up in *Shively v. Bowlby*, 152 U.S. 1, 48:

> . . .[C]ongress has the power to make grants of land below the high water mark of navigable waters in any territory of the United States whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign Nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory.

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[7] It must be pointed out that this, like so many other cases, turned on a question of navigability, which question has been stipulated in the present case.

Certainly it cannot be denied that the grant of fee simple title to the Cherokee Nation to all the land within the perimeters of the metes and bounds description was for a valid public purpose. Although the Court of Appeals left this question unanswered, the facts underlying the treaty of 1835 and the Indian Removal Bill of 1830 manifest the public purpose to acquire the valuable Cherokee lands in the east for settlement, to obtain title, and to control the rivers within the Indian domain and to avoid further conflict and contact with the Indians.[8]

The Court of Appeals appears to be impressed by the argument that unless title to the land under the navigable portion of the Arkansas River passed to the state upon its admission to the Union, the power of Congress to regulate commerce would somehow be jeopardized or compromised. However, there is nothing in the conveyance of title to the land beneath the navigable waters which conflicts with the power of the Government to hold such lands for navigation. *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946).

As stated, the implied trust-equal footing doctrine in no way impairs the power of Congress to convey title to land beneath navigable waters. "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land, as well as the upland, needs little more than statement. *All were the property of the United States...* over which Congress had complete legislative authority." (Emphasis added.) *Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 87. It cannot be truly argued that the federal government, the sovereign, is bound to retain title to land beneath the navigable

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[8] A recognized public purpose is that of safeguarding and advancing a dependent people dwelling within the United States. *United States v. Rickert,* 188 U.S. 432.

waters until such time as a state is formed, whatever period of years that might be.[9]

Indeed, the language of the treaties themselves refutes the application of the implied trust-equal footing doctrine. In the preamble of the Treaty of 1828, it was stated:

> Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, or any of the limits of any existing Territory or State; see App. A, *infra.*

A *permanent* home for the Cherokees free from the intrusion of the United States or any territory or state does not comport with a trust relationship for any future state. Again in Article 5 of the Treaty of New Echota in 1835, it was stated:

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[9] In the two cases relied upon by the Court of Appeals, *Pollard v. Hagan,* 44 U.S. [3 How.] 212 and *United States v. Holt State Bank,* 270 U.S. 49, it should be noted, *inter alia,* that statehood for Alabama and Minnesota was imminent. In this case the formation of a new state was not considered or impending at the time of the grant. Oklahoma did not come into existence for almost 75 years after the first grant of land in Indian Territory to the Cherokee Nation.

> ARTICLE 5. The United States hereby convenant and agree that the *lands ceded to the Cherokee nation* in the foregoing article shall, *in no future time* without their consent, *be included within the territorial limits or jurisdiction of any State or Territory.* But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the consitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same. [Emphasis added.]

It is difficult to conceive of an implied trust for a new state or states, when Congress specifically stated that no state would be formed to include the lands of the Cherokee Nation. The manifest intent was to provide a home from which they could not be crowded out.[10] In its opinion the Court of Appeals asserts that the above stated provisions of the treaties related "to the exercise of political power rather than property rights." App. 141a. This statement demonstrates vividly the failure of

[10] The Cherokee Nation was to be completely sovereign with the power to exclude white men from its land. See letter of Isaac McCoy, September 20, 1837, reflecting the contemporaneous appreciation that no state would be formed in Indian lands and the Government would protect the Indians. App. E, *infra.*

the appellate court to grasp the meaning and purpose of the equal footing doctrine. The treaties and patent in question obviously conveyed property. To the Cherokee Nation or any Indian tribe, such property rights would be valueless, if at the same time power over this property could be vested in a state or territory. The treaties guaranteed to the Cherokee Nation quiet and secure title to all the land conveyed and the power to administer the land ceded, the power to govern absolutely within the perimeter of its metes and bounds description. This power was not impinged upon until the Act of 1902 broke down the communal tribal property structure and distributed tribal lands to enrolled members, so that the state of Oklahoma could be formed.

The Cherokee Nation as with other Indian tribes was a dependent sovereign to whom the Government owed a duty of trust. Indeed from its earliest treaty relationship the Government had promised the Cherokee Nation its care and protection. In such a relationship of trust, it is inconceivable that the United States could also serve as trustee for a future state, when such a trust would be adverse and inconsistent with its prior obligation to the Indian tribe. As was said in *United States v. Creek Nation*, 295 U.S. 103, 109, 110.

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of the Government. But this power to control and manage was not absolute. . . .[I]t was subject to the limitation inhering in such a guardianship and to pertinent constitutional restrictions.

To assert the application of the implied trust-equal footing doctrine against the interest of the Cherokee Nation would mean that the Government intended to and did breach its primary fiduciary obligation.

The intent of Congress cannot be extrapolated; it is to be ascertained from the documents, treaties, patents, and letters, the entire situation and needs of the Indian and the object to be attained. One of the foremost objects to be attained in the relocation of the Cherokee Nation was the maintenance of tribal sovereignty. This objective could not be attained if the Government retained title to strips of land running throughout this grant of vast acreage.[11] It is even more difficult to apply to these treaties an implied trust doctrine which was not articulated as a controlling policy consideration until 1845 in *Pollard v. Hagan*, in a situation involving an express trust. To admit that at the time the Government negotiated these treaties, guaranteeing title and protection of tribal sovereignty, Congress was reserving title to the riverbed for a future state, yet-to-be-thought-of, would be to admit that the Congress and the Executive never intended that the United States honor its treaty commitments. As this Court stated in *Menominee Tribe v. United States*, 391 U.S. 404, 412, quoting *Pigeon River Co. v. Cox Ltd.*, 291 U.S. 138, 160, "The intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."

If Congress intended to reserve or retain title to the land beneath the Arkansas River, it should have done so specifically. At no point did the Government reserve or exclude from transfer any portion of the land within the metes and bounds description. The language in the metes and bounds description was clearly stated and that should control. *Lowndes v. Town of Huntington*, 153 U.S. 1.

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[11] The land ceded to the tribes was not surveyed until 1831-1832. At the time of the grant it was not clear how many navigable rivers were contained in the tract. If followed to its logical conclusion, the argument of the State of Oklahoma would hold that the federal government retained title to as yet unknown and uncharted rivers.

The Arkansas River, the subject matter of this suit, has been used as a landmark in all the treaties between the Government and the Cherokee Nation. Compare Article 2, Treaty of 1828, Appendix A; Article I, Treaty of 1833, Appendix B; Article 2, Treaty of 1835, Appendix C. In none of the treaties did the Government reserve or exclude any portion of the land within the metes and bounds description. The description contained in the 1835 Treaty of New Echota brings together the grants contained in the prior treaties:

> ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said territorial line crosses Verdigris river; thence down said Verdigris river *to the Arkansas river; thence down said Arkansas to a point where a stone is* placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly; from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; *thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri*;

> thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend: (Emphasis added.)

This same description was included in the patent of 1838, as follows:

> Thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of the Arkansas river, four chains and fifty-four links East of Ft. Smith.[12]

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[12] The Arkansas River by treaty and patent was established as the boundary between the Cherokee and Choctaw lands. The Cherokee Nation was granted its lands down the main channel of the Arkansas River, although surveys of the Choctaw and Cherokee line began on the South bank of the river. See App. F, letter of March 11, 1886, *infra*, which summarizes the various Cherokee and Choctaw treaties placing the Arkansas River within the Cherokee grant. In any event, it is clear that the Arkansas River was not reserved for some future State.

In the Enabling Act of 1906 [34 Stat. 267], Congress again recognized the integrity of the Cherokee tribal lands when it specifically provided that certain lands would belong to the Indians and the tribes and would not become part of the State of Oklahoma. The then territory of Oklahoma entered the Union upon the condition:

> That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said limits owned or held by any Indian or Indian * * * *.

In its own constitution (Article I, Section 3) the state incorporated this provision.[13]

Prior to Oklahoma becoming a state in 1907, Congress acting under the recommendations of the Dawes Commission, enacted the Curtis Act (30 Stat. 495, June 28, 1898) and the Act of July 1, 1902, the so-called Cherokee Allotment Agreement and the Act of April 26, 1906. These Acts provided for the allotment of tribal lands to all members of the tribe as shown on the Cherokee citizenship rolls. Under these Acts the Cherokee lands were divided. No disposition was made of the land under the Arkansas River. The existence of the tribe and its government have been perpetuated by successive acts of Congress, concluding with Section 28 of the Act of April 26, 1906 which provided "the tribal existence and the

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[13] It is difficult to square this exclusion of certain lands from state ownership with the Court of Appeals' determination that anything less than complete dominion and control of land within the state would relegate Oklahoma to the status of a second-class state.

present tribal government . . . are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, . . ." 34 Stat. 137, ch. 1876, April 26, 1906; 34 Stat. 822, March 2, 1906, Pub. Res. No. 7. See also Title 25 U.S.C. Section 993(b) (1962).

Accordingly, the land in question is still held by the Cherokee Nation and did not pass to the state by operation of law under implied trust-equal footing doctrine.

2. The United States Government Intended to and Did Convey to the Cherokee Nation Fee Simple Title to the Land within the Metes and Bounds Description of the Treaties and Patent including the Land under the Navigable Portion of the Arkansas River.

A. Nature of the Cherokee Title

In the respondent's brief in opposition to the petition for certiorari, the respondent challenged the nature and scope of the title conveyed by the Government to the Cherokee Nation. It is important to recognize at this point that the title held by the Cherokee Nation and the other Five Civilized Tribes is not the usual aboriginal Indian title held by use and occupancy, but it is a fee simple title acquired by treaty and evidenced by the patent of 1838. See, *e.g. United States v. Creek Nation* 295 U.S. 103. The United States Government granted to the tribe a terminable fee, that is, a grant of fee simple title upon the condition that the lands would revert to the United States only if and when the Cherokee Nation ceased to exist or abandoned the same. See Treaty of 1838, 7 Stat. 478; patent of 1838 paragraphs Art. 2d and Art. 3d; App. C and D, respectively.

The fact that the fee was terminable by an event which still has not occurred, that is, the extinction of the tribe and tribal government[14] did not affect or detract from the quality of the title vested in the Nation. By granting the Cherokee Nation fee simple title, the Government assured the tribe that it would hold its land as the white man did.[15] See *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335, 340.

The distinction between two types of title is basic to the understanding of this case. Compare *Shoshone Tribe v. United States*, 299 U.S. 476 with *United States v. Creek Nation*, 295 U.S. 103. As the Court pointed out in the *Creek Nation* case, *supra*, "The Creek Tribe had fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession." Indeed, the patent to the Cherokee Nation was the *first patent* ever issued to an Indian Tribe, and the treaty likewise "guaranteed and secured, to be conveyed by patent, to the Cherokee Nation of Indians the following tract of country . . ." See Article 2, Treaty of 1835, App. C, *infra*. The description which followed included the Arkansas River from its confluence with the Neosho Grand to the Canadian River and from the Canadian to the western border of Arkansas.

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[14] Certainly the tribe did not abandon the land in question. The tribe and tribal members despite the State of Oklahoma's arguments to the contrary have considered the land to belong to the tribe and on this basis sought an accounting.

[15] Commissioner Schermerhorn's address to the Cherokees, July 20, 1835, Senate Ex. Doc 120, Twenty-Fifth Congress, 2d session, pp. 456-457.

The land granted to the Cherokee Nation and the other Five Civilized Tribes was, as mentioned, in the nature of fee simple grants evidenced by patent. Consequently, the need for precision was understood and arrangements were made for surveys and boundary lines using the treaty metes and bounds description. See, for example, Article 3 of the Treaty of 1828. Under the treaties with the Cherokee Nation, the Government had ceded *two* tracts of land, each containing approximately seven million acres. These tracts were to be included in a single patent. Similarly, the Choctaws and Chickasaws had been ceded land to the south of the Cherokee Nation. The claim of the Choctaw and Chickasaw Nations will be set forth in their brief, No. 976. It becomes evident from an examination of the surveys, treaties, and patent, that Congress granted to the Cherokee Nation fee simple title to the entire tract without reservation.

In 1821 Henry Downs, Commissioner, made his report to the Secretary of War of a survey which he had been directed to make of the Choctaw boundary line west of the Mississippi. Mr. Downs states that he made such survey:

> beginning at the mouth of Little River, running thence down Red River to a point three miles below the mouth of Little River, running thence north twenty-nine degrees and fifteen minutes east, one hundred and fifteen miles, ten chains and fifty links to a post on the *south bank* of the Arkansas River, where the *lower boundary* line of the Cherokees strikes the same; running thence with the course of the Arkansas River, to the mouth of the Canadian Fork. (Emphasis added.)

A second survey of the Choctaw line was conducted by Mr. Conway. From the plat which was prepared, it appears that the northern terminus of the Choctaw line

ceases at a point on the south bank of the Arkansas River, or in the Channel of the River.[16]

In 1831-1832 Reverend Isaac McCoy surveyed the Cherokee line from the southwest corner of Missouri to Ft. Smith on the Arkansas River. From his field notes it is clear that the Arkansas River was included within the survey.

> Thence along the channel of the river 64.50 chains to the south bank where the northern extremity of the eastern boundary of the Choctaw land strikes the Arkansas.

The quality of the Cherokee fee simple title was clearly understood by Congress and this title has been sustained in prior court proceedings. Recently in 1961 the Cherokee Nation was successful in recovering an award of over 14 million dollars against the Government for the so-called Outlet Lands. The Indian Claims Commission in Case No. 173 determined that the Cherokee Nation obtained by the treaties of 1828, 1833, and 1835 fee simple title to these outlet lands, 9 Ind. Cl. Comm. 162. No one until now has ever challenged or disputed the fee simple title to the Cherokee home tract.

The Court of Appeals in its decision affirming the judgment of the lower court relied upon *United States v. Holt State Bank*, 270 U.S. 49. This case highlights the distinction between aboriginal Indian title and fee simple title. In *Holt State Bank*, the Chippewa Indians by a series of treaties ending in 1854, just prior to Minnesota becoming a state, ceded to the United States their aboriginal title which the tribe held by use and occu-

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[16] The purpose of the recitation of the surveys is not to resolve the dispute between the Cherokees and Choctaws, but to demonstrate that the Arkansas River was intended to be and was included in the metes and bounds survey.

pancy. Among the lands retained as part of their reservation was Mud Lake. The Chippewa Indians had nothing approaching a right to the land underlying Mud Lake. *United States v. Stotts,* 49 F. 2d 619 (W.D. D.C. Wash. 1930). In 1858 Minnesota became a state subject to the right of use and occupancy of land held by the Indians. In 1889 the Indians ceded all their lands to the United States to be sold and the proceeds placed in trust (Act of June 14, 1889, 25 Stat. 642). Sometime after statehood and cession of the lands, including Mud Lake by the Chippewas, to the United States in 1889, Mud Lake was drained, and the state granted the title to the land to homesteaders. The Government contended that the Indians had reserved the title to the land under Mud Lake at the time that Minnesota entered the Union, that title to the land under the lake had not passed to the state under the implied trust-equal footing doctrine, and therefore, the Indians and those who took title from them were the true owners. It must be emphasized that the United States at all times *had the fee simple title* to the land under Mud Lake; the Indians had only the right of use and occupancy. As Mr. Justice Van Devanter stated in the Court's opinion:

> The title to the bed of Mud Lake then passed to the state, if the lake was navigable, and *if the bed had not already been disposed of by the United States.* Id. at 55. (Emphasis added.)

In the case of Mud Lake the Government had not granted the fee simple title to the land to anyone prior to the entry of Minnesota into the Union. The fee was subject only to the right of use and occupancy by the Chippewas. When Minnesota became a state, the fee simple title to the land under Mud Lake passed to the state; and when in 1889 the Indians ceded their right of occupancy to the federal government, the fee simple title held by the state, was left unencumbered.

The Court in *Holt State Bank* determined that the title to the land under Mud Lake passed to the State of Minnesota under the equal footing doctrine because (1) the lands had not been previously disposed of and (2) "there was nothing in this which even approaches a grant of rights in lands underlying navigable waters; *nor anything evincing a purpose to depart from* the established policy, before stated, of treating such lands as held for the benefit of the future state." *United States v. Holt State Bank*, 270 U.S. 49, 55, 58, 59.

In the case here presented the United States Government by the series of treaties beginning in 1828 granted to the Cherokee Nation *fee simple title* to the land in question. The title was guaranteed and evidenced by the patent of 1838. This title has remained in the tribe, and it is this title which the tribe asserts as the basis for its demand for an accounting.

B. The Intention of Congress with Regard to the Scope of the Grant

It has been asserted both by the respondents and the Court of Appeals that the treaties and patent did not convey title to the land under the navigable portion of the Arkansas River because there was no express language in the documents nor any manifestation of Congressional intent to do so. The combination of treaty and patent languages evinces the clear intent to cede the Cherokee Nation everything within the description. The manifestation of intent required by the appellate court to sustain such a grant is far greater than that required by this Court. In attempting to elicit the intent of the parties with regard to the meaning and purpose of a particular treaty, this Court has sought *anything* which would evince a purpose to depart from the established policy of holding such lands for a future state. *United States v. Holt State Bank*, 270 U.S. 49, 59.

In order to interpret treaties and patents, such as those in the instant case, the Court must appreciate the circumstances in which the treaties were drawn and words used; the Court must consider the location of the land, the situation and needs of the Indians, and the object to be attained. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78. The Court of Appeals by asserting that nothing passes from the sovereign by implication[17] and demanding a manifestation of intent far greater than ever previously required, has taken a position contrary to the weight of decided Indian cases. *Holt State Bank*, rather than supporting the Court of Appeals, buttresses the position of the Cherokee Nation. Unlike the Court of Appeals in this case which focused on only one fact, the treaty provision that no state would be formed in the ceded lands, this Court in *Holt State Bank* examined and weighed all the factors and circumstances to arrive at the intent of the parties. See App. 141a. *Holt State Bank*, when it was decided by Mr. Justice Van Devanter, was grounded on the rules of construction for interpretation of Indian treaties.

In construing Indian treaties, the usual rules of construction do not apply. The Indians as a dependent people are under the protection of the Government, and treaties are to be interpreted liberally in their favor. *Jones v. Meehan*, 175 U.S. 1; *Blue Jacket v. Johnson County*, 72 U.S. [5 Wall.] 737. Indeed, the Court in *Holt State Bank* asked not for a clear manifestation of intent, but *anything* that would evince a public purpose

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[17] The two cases relied upon by the Court of Appeals, *Northern Pacific Ry. Co. v. Soderberg*, 188 U.S. 526, and *Caldwell v. United States*, 250 U.S. 14, are not Indian cases. In dealing with Indians, a dependent people under the protection of the Government, treaties are construed more liberally for their benefit.

to depart from the policy of treating lands as held for the benefit of future states.[18]

The intent and sense of the treaties is to be obtained not only from the words of the documents, but from the circumstances and contemporaneous events and from the habits and way of life of the Indian tribe.[19] When Congress granted the Cherokee Nation some fourteen million acres as its home, it fully intended the Nation to be relocated and reconstituted as sovereign in its own land. Congress and the Executive wanted no further conflict, no further contact with these Indians.[20] Indeed, it was for this reason that the Government provided "for conveyance of the whole of it by patent in fee simple and also for the security of necessary political rights and for preventing white persons from trespassing upon you." See Appendix G, *infra,* Address of President Jackson to the Cherokees, March 16, 1835, Senate Doc. 1, Twenty fourth Cong. first sess. p. 25.

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[18] As discussed at pp. 30-31, *infra,* the Court in *Holt State Bank* grasped the distinction between aboriginal Indian title and fee simple title. The Court well knew that without some manifestation of intent, mere occupancy and use of the land would give the Indians no permanent claim against the fee simple title which passed to the state. See *Moore v. United States*, 157 F.2d 760, 765.

[19] The Court said in *United States v. Winans,* 198 U.S. 371, 380-81, "...[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all case where power is exerted by the strong over those to whom they owe care and protection, and counter poise the inequality by the superior justice which looks only to the substance of the right, without regard to technical rules' "

[20] Prior to 1906, the United States pursued a policy of exchange and removal whereby the Indians were kept separate and isolated from the white settlers and settlements.

An examination of the treaties in question manifests the clear intent of Congress to relocate and establish the Cherokee Nation in new lands over which it could exercise the same use, dominion and control as it did in its former lands. The treaty of New Echota with the Cherokee Nation cannot be examined in a vacuum.

Congress was very familiar with the Cherokee Nation; its treaty dealings with the tribe went back to 1785. Congress had long recognized the sovereignty of the Nation. The nature of this sovereignty had been described by Mr. Chief Justice Marshall in *Worcester v. State of Georgia*, 31 U.S. [6 Pet.] 515, 556. The Cherokee Nation as sovereign on its lands could exclude white settlers from crossing its land or navigating on the Tennessee River. The Cherokee Nation was an educated, agricultural, political society. Accordingly, it was Congress' intent in removing the Cherokee Nation to the West to establish it in the same condition. The purpose and intent of Congress is clearly manifested in the Preamble to the Treaty of New Echota.

> Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their *views, habits*, and *condition*: and as may tend to their individual comfort and their advancement in civilization. (Emphasis added.)

This Court has previously recognized the unique situation created with the Cherokee Nation. In *Atlantic & Pacific Railroad Co. v. Mingus*, 165 U.S. 413, 435, 436, it was emphasized that "a reference to some of the treaties under which it [the land in Oklahoma] is held by the Indians indicates that it stands in an entirely different relationship to the United States from other territories and that for most purposes it is to be considered an *independent country*." (Emphasis added.)

Congress in its treaties assured to the Cherokee Nation the power to exclude white men from crossing or using its land without its permission. See Articles 5 and 6 of the Treaty of 1835, Appendix C, *infra.* In many of the contemporaneous speeches interpreting the treaty, it was stated that white persons would be prevented from trespassing upon the tribal land.

The Congress and proponents of the treaties emphasized:

> There Cherokees, you will make laws for yourself, and establish such government as in your estimation may be best suited to your condition. There Cherokees in your new country you will be far beyond the limits or jurisdiction of any State or Territory. The *country will be yours exclusively*. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man. (Emphasis added.) Ex. papers no. 64, Eighteenth Congress, 2d sess., talk of special agent Mason to Cherokee Council at Red Clay, East Tennessee, July 31, 1837. See Appendix H. *infra.*

The intent of Congress to establish the Cherokee Nation in a permanent home preserving its tribal integrity and sovereignty must mean that the Cherokee Na-

tion received fee simple title to all the property within the metes and bounds description, including the Arkansas River.

It is an established guide for interpretation that the Court consider the way of life of the Indian tribe in order to fix the extent of the treaty grant. *United States v. Winans*, 198 U.S. 371.

The prior habits and condition of the Cherokee Nation demonstrate a need and use for the Arkansas River. In their former lands the Cherokees used the streams and rivers as avenues of commerce, for food, for irrigation, and other purposes. Although there were no express words in the grant, several treaties have been interpreted to include within the grant of upland and shore land, the title to the land below the navigable waters because such was essential to the enjoyment of the land and was consonant with the customs and habits of the tribe. *Winters v. United States*, 207 U.S. 564; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78; see also *Menominee Tribe of Indians v. United States*, 391 U.S. 404, footnote 2.

It is also important in attempting to arrive at the sense of the treaties and the intent of the parties, to look at the events which took place subsequent to the action in question. In the case of the Cherokee Nation it always considered itself the owner of the land under the Arkansas River. Long before the admission of Oklahoma into the Union, the Cherokee Nation worked the river for sand and gravel and negotiated sand and gravel leases with many companies and received royalties for such minerals.[21]

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[21] See Appendix I, *infra*, which is a letter from the Oklahoma Historical Society setting forth some of the leases; also as part of Appendix I is a certified copy of the Register of Mineral License

(Cont'd on p. 38)

Congress understood the way of life of the Cherokee Nation, and it is clear that Congress wanted to preserve it.

The intent of Congress to convey title to all the land, including that under the Arkansas River, within the metes and bounds description is also demonstrated by the fact that Congress conveyed the land in one vast tract and executed its *first patent* with an Indian tribe expressly setting forth and memorializing the metes and bounds description,[22] without exception or reservation. Appendix D, *infra*. It is also significant to note the precise words used in the patent.

> thence from the lower bank of Verdigris river on the *north Bank of Arkansas* river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the *south bank of Arkansas* opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence

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[21] (Cont'd from p. 37)
dated April 12, 1884, to March 9, 1891. After the admission of Oklahoma into the Union, the Supreme Court of Oklahoma in *Lynch v. Clemens* 263 P.2d 153; (Okla. 1953) and *Vickery v. Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 p. 2d 881 (1932) determined that the riverbed passed to the State upon admission and the Cherokee allottees claiming sand and gravel royalties were not entitled to them. These two cases were, petitioner submits, erroneously decided and are not binding upon this Court.

[22] The treaties of 1833 and 1835 read ". . . down the Canadian to the Arkansas; . . ." The Patent of 1838 uses confirming and consistent terms ". . . down the Canadian River on its north bank to its junction with Arkansas; . . ." Since the Canadian is flowing toward the northeast at that point the junction point would be on the south bank of the Arkansas River, thereby encompassing the river.

> south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * thence down the Canadian river on its north bank to its junction with Arkansas river; *thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of* the *lands of the Choctaws on the south bank of Arkansas river*, four chains and fifty four links east of Fort Smith;

The Court of Appeals and the respondents assert that these terms are mere reference points. However, by use of these references, it is clear that the Arkansas River is included within the grant under the dominion and control of the patentee, the Cherokee Nation. The patent uses words of art such as "down the main channel." In international law and usage of European nations, adopted by this country, the terms "middle of the stream" and "mid channel of a navigable river" are synonymous and interchangeably used when determining what is to be the boundary between states. In *State of Iowa v. State of Illinois*, 147 U.S. 1, 10, this Court analyzed such terms.

> The Enabling Act ... under which Wisconsin adopted a constitution and became a state and was admitted into the Union, gives the western boundary of that state, after reaching the river St. Croix as follows: Thence *down the main channel* of said river to the Mississippi, thence *down the centre of the main channel* ... are synonymous. [Emphasis added.]

This Court also determined that the meaning of the term "channel" referred not to the navigable waters, but to the riverbed.

> On the other hand, the bed of the main river designated by the word *channel*, used in its primary sense, is the great body of water flowing down the stream ... the broad and distinctly defined *bed of the main river*. Id. at 12. (Emphasis added.)

The effect of such grants to the mid-channel or down the main channel is to bestow upon the grantee jurisdiction, sovereignty over the river to the thread of the stream. Id. at 12. Such jurisdiction or sovereignty carries with it proprietary rights, *e.g.*, alluvial soil. *Anderson-Tully Co. v. Tingle*, 166 F.2d 224 (5th Cir. 1948).

Again it must be reiterated that the combination of treaty and patent language evinces the clear intent to cede to the Cherokee Nation everything within the description. See *Choate v. Trapp*, 224 U.S. 665, 673, "the patent and legislation of Congress must be construed together," when so construed, they demonstrate the intent of Congress. "It is also a rule of construction that when one section of a statute treats specially and solely, of a matter, that section prevails in reference to that matter over other sections in which only incidental reference is made thereto." *Griffith v. Carter*, 8 Kan. 565 (1871). Congress and the Executive were under no obligation to promise a patent in fee simple, yet this is precisely what was done. In so doing, the patent included the Arkansas River within its description, without any exception or reservation. This action is a clear and convincing manifestation of Congressional intent, in and of itself. Certainly the language of the treaty and patent take even greater significance when coupled with the other circumstances here related.

CONCLUSION

For all these reasons herein stated, the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

Excerpts

TREATY WITH THE WESTERN CHEROKEE MAY 6, 1828
(7 Stat. 311, Vol. II, Kappler, 288)
Proclaimed May 28, 1828

Articles of a Convention, concluded at the City of Washington this sixth day of May, in the year of our Lord one thousand eight hundred and twenty-eight, between James Barbour, Secretary of War, being especially authorized therefor by the President of the United States, and the undersigned, Chiefs and Head Men of the Cherokee Nation of Indians, West of the Mississippi, they being duly authorized and empowered by their Nation.

Whereas, it being the anxious desire of the Government of the United States to secure to the Cherokee nation of Indians, as well as those now living within the limits of the Territory of Arkansas, as those of their friends and brothers who reside in States East of the Mississippi, and who may wish to join their brothers of the West, *a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, or any of the limits of any existing Territory or State; and, Whereas, the present location of the Cherokees in Arkansas being unfavorable to their present repose, and tending, as the past demonstrates, to their future degradation and misery; and the Cherokees being anxious to avoid such consequences, and yet not questioning their right to their lands in Arkansas, as secured to them by Treaty, and resting also upon the pledges given them by the President of the United States, and the Secretary of War, of March, 1818, and 8th October, 1821, in regard to the outlet to the West, and as may be seen on referring to the records

of the War Department, still being anxious to secure a permanent home, and to free themselves, and their posterity, from an embarrassing connexion with the Territory of Arkansas, and guard themselves from such connexion in future; and, Whereas, it being important not to the Cherokees only, but also to the Choctaws, and in regard also to the question which may be agitated in the future respecting the location of the latter, as well as the former, within the limits of the Territory or State of Arkansas, as the case may be, and their removal therefrom; and to avoid the cost which may attend negotiations to rid the Territory or State of Arkansas whenever it may become a State, of either, or both of those Tribes, the parties hereto do hereby conclude the following Articles, viz:

ARTICLE 1. The Western boundary of Arkansas shall be, and the same is, hereby defined, viz: A line shall be run, commencing on Red River, at the point where the Eastern Choctaw line strikes said River, and run due North with same line to the River Arkansas, thence in a direct line to the South West corner of Missouri.

ARTICLE 2. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz: Commencing at that point on Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South-West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due West to a point from which a due South course will strike the present North-West corner of Arkansas Territory, thence continuing due South, on and with the present boundary line of the Territory to the main branch of Arkansas River, and thence down said River to its junction with the Canadian

River, and thence up and between the said Rivers Arkansas and Canadian, to a point at which a line running North and South from River to River, will give the aforesaid seven millions of acres. In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the Country lying West of the Western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of soil extend.

ARTICLE 3. The United States agree to have the lines of the above cession run without delay, say not later than the first of October next, and to remove, immediately after the running of the Eastern line from the Arkansas River to the South-West corner of Missouri, all white persons from the West to the East of said line, and also all others, should there be any there, who may be unacceptable to the Cherokees, so that no obstacles arising out of the presence of a white population, or a population of any sort, shall exist to annoy the Cherokees—and also to keep all such from the West of said line in future.

* * *

ARTICLE 8. The Cherokee Nation, West of the Mississippi having, by this agreement, freed themselves from the harassing and ruinous effects consequent upon a location amidst a white population, and secured to themselves and their posterity, under the solemn sanction of the guarantee of the United States, as contained in this agreement, a large extend of unembarrassed country; and that their Brothers yet remaining in the States may be induced to join them and enjoy the repose and blessing of such a State in the future, it is further agreed, on the part of the United States, that to each Head of a Cherokee family now residing within the chartered limits of Georgia, or of either of the States, East of the Mississippi, who may desire to remove West, shall be given * * *.

ARTICLE 9. It is understood and agreed by the parties to this Convention, that a Tract of Land, two miles wide and six miles long, shall be, and the same is hereby, reserved for the use and benefit of the United States, for the accommodation of the military force which is now, or which may hereafter be, stationed at Fort Gibson, on the Neosho, or Grand River, to commence on said River half a mile below the aforesaid Fort, and to run thence due East two miles, thence Northwardly six miles, to a point which shall be two miles distant from the River aforesaid, thence due West to the said River, and down it to the place of beginning. And the Cherokees agree that the United States shall have and possess the right of establishing a road through their country for the purpose of having a free and unmolested way to and from said Fort.

* * *

ARTICLE 11. This Treaty to be binding on the contracting parties so soon as it is ratified by the President of the United States, by and with the advice and consent of the Senate.

Done at the place, and on the day and year above written.

James Barbour	(L.S.)
Black Fox, his x mark,	(L.S.)
Thomas Graves, his x mark,	(L.S.)
George Guess,[a]	(L.S.)
Thomas Maw,[a]	(L.S.)
George Marvis,[a]	(L.S.)
John Looney,[a]	(L.S.)
John Rogers,	(L.S.)
J. W. Flawey, counsellor of Del.	(L.S.)
Chiefs of the delegation	

[a] Written by the signers in their language, and in the characters now in use among them, as discovered by George Guess.

Witnesses:

Thos. L. McKenney
James Rogers, interpreter,
D. Kurtz,
H. Miller,
Thomas Murray,
D. Brown, secretary Cherokee delegation,
Pierye Pierya,
E. W. Duval, United States agent, etc.

Ratified with the following proviso:

"Provided, nevertheless, that the said convention shall not be so construed as to extend the northern boundary of the 'perpetual outlet west,' provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty or treaties heretofore concluded between the United States and the Creek tribe of Indians; and provided further, That nothing in the said convention shall be construed to cede or assign to the Cherokees any lands heretofore ceded or assigned to any tribe or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes."

DEPARTMENT OF WAR,
31st May, 1828.

TO THE HON. HENRY CLAY,
Secretary of State:

SIR: I have the honor to transmit, herewith, the acceptance of the terms, by the Cherokees, upon which the recent convention with them was ratified. You will have the goodness to cause the same to be attached to the treaty, and published with it.

I have the honor to be, very respectfully, your obedient servant,

SAM'L. L. SOUTHARD.

COUNCIL ROOM, WILLIAMSON'S HOTEL,
Washington, May 31st, 1828.

TO THE SECRETARY OF WAR,
Washington City:

SIR: The undersigned, chiefs of the Cherokee nation, west of the Mississippi, for and in behalf of said nation, hereby agree to, and accept of, the terms upon which the Senate of the United States ratified the convention, concluded at Washington on the sixth day of May, 1828, between the United States and said nation.

In testimony whereof, they hereunto, subscribe their names and affix their seals.

Thomas Graves, his x mark,	(L.S.)
George Maw, his x mark,	(L.S.)
George Guess, his x mark,	(L.S.)
Thomas Marvis, his x mark,	(L.S.)
John Rogers,	(L.S.)

Signed and sealed in the presence of–

E. W. Duval, United States agent, etc.
Thomas Murray,
James Rogers, interpreter.

APPENDIX B

Excerpts

TREATY WITH THE WESTERN CHEROKEE
FEBRUARY 14, 1833
(7 Stat. 414, Vol. II, Kappler, 385)
Proclaimed April 12, 1834

Articles of agreement and convention made and concluded at Fort Gibson, on the Arkansas river on the fourteenth day of Febraury one thousand eight hundred and thirty-three, by and between Montfort Stokes, Henry L. Ellsworth and John F. Schermerhorn duly appointed Commissioners on the part of the United States and the undersigned Chiefs and Head-men of the Cherokee nation of Indians west of the Mississippi, they being duly authorized and empowered by their nation.

Whereas articles of convention were concluded at the city of Washington, on the sixth day of May one thousand eight hundred and twenty-eight, between James Barbour Secretary of War, being specially authorized therefor by the President of the United States, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi, which articles of convention were duly ratified. And whereas it was agreed by the second article of said convention as follows "That the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, said land to be bounded as follows; viz, commencing at a point on Arkansas river, where the eastern Choctaw boundary line strikes said river, and running thence with the western line of Arkansas Territory to the southwest corner of Missouri, and thence with the western boundary line of Missouri till it crosses the waters of Neosho, generally called Grand River, thence due west, to a point from which a due south course will strike the present northwest corner of Arkansas Territory, thence continuing due south on and with the present

boundary line on the west of said Territory, to the main branch of Arkansas river, thence down said river to its junction with the Canadian, and thence up, and between said rivers Arkansas and Canadian to a point at which a line, running north and south, from river to river, will give the aforesaid seven millions of acres, thus provided for and bounded. The United States further guarantee to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits; and as far west, as the sovereignty of the United States and their right of soil extend. And whereas there was to said articles of convention and agreement, the following proviso viz. "Provided nevertheless, that said convention, shall not be so construed, as to extend the northern boundary of said perpetual outlet west, provided for and guaranteed in the second article of said convention, north of the thirty-sixth degree of north latitude, or so as to interfere with the lands assigned, or to be assigned, west of the Mississippi river, to the Creek Indians who have emigrated, or may emigrate, from the States of Georgia and Alabama, under the provisions of any treaty, or treaties, heretofore concluded, between the United States and the Creek tribe of Indians—and provided further, that nothing in said convention, shall be construed, to cede, or assign, to the Cherokees any lands heretofore ceded, or assigned, to any tribe, or tribes of Indians, by any treaty now existing and in force, with any such tribe or tribes." —And whereas, it appears from the Creek treaty, made with the United States, by the Creek nation, dated twenty-fourth day of January eighteen hundred and twenty-six, at the city of Washington; that they had the right to select, and did select, a part of the country described within the boundaries mentioned above in said Cherokee articles of agreement—and whereas, both the Cherokee and Creek nations of Indians west of the Mississippi, anxious to have their boundaries settled in an

amicable manner, have met each other in council, and, after full deliberation mutually agreed upon the boundary lines between them—Now, therefore, the United States on one part, and the chiefs and head-men of the Cherokee nation of Indians west of the Mississippi on the other part agree as follows:

ARTICLE I. The United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee, is hereby pledged, of seven millions of acres of land, to be bounded as follows viz: Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the Territorial line crosses Arkansas river—thence running from said north point, south, on the said Territorial line to the place where said Territorial line crosses the Verdigris river—thence down said Verdigris river, to the Arkansas, thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river at its junction with the Arkansas—thence running south, forty-four degrees west, one mile—thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian—thence along the said four miles lines to the Canadian—thence down the Canadian to the Arkansas—thence, down the Arkansas, to that point on the Arkansas, where the eastern Choctaw boundary strikes, said river; and running thence with the western line of Arkansas Territory as now defined, to the south-west corner of Missouri—thence along the western Missouri line, to the land assigned the Senecas; thence, on the south line of the Senecas to Grand river; thence, up said Grand river, as far as the south line of the Osage reservation, extended if necessary—thence up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described

boundaries. In addition to the seven millions of acres of land, thus provided for, and bounded, the United States, further guarantee to the Cherokee nation, a perpetual outlet west and a free and unmolested use of all the country lying west, of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended–Provided however, that if the saline, or salt plain, on the great western prairie, shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men, to get salt on said plain in common with the Cherokees–and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

ARTICLE II. The Cherokee nation hereby relinquishes and quit claim to the United States all the right interest and title which the Cherokees have, or claim to have and to all the land ceded, or claimed to have been ceded to said Cherokee nation by said treaty of sixth of May one thousand eight hundred and twenty-eight, and not embraced within the limits or boundaries fixed in this present supplementary treaty or articles of convention and agreement.

ARTICLE III. The Cherokee nation, having particularly requested the United States to annul and cancel the sixth article of said treaty of sixth May, one thousand eight hundred and twenty-eight, the United States, agree to cancel the same, and the same is hereby annulled–Said sixth article referred to, is in the following words–"It is moreover agreed by the United States, when the Cherokees may desire it, to give them a plain set of laws, suited to their condition–also when they may wish to lay off their lands and own them individually, a surveyor shall be sent to survey them at the expense of the United States.

* * *

ARTICLE V. These articles of agreement and convention are to be considered supplementary, to the treaty before mentioned between the United States, and the Cherokee nation west of the Mississippi dated sixth of May one thousand eight hundred and twenty-eight, and not to vary the rights of the parties to said treaty, any further, than said treaty is inconsistent with the provisions of this treaty, now concluded, or these articles of convention or agreement.

ARTICLE VI. It is further agreed by the Cherokee nation, that one mile square shall be reserved and set apart from the lands hereby guaranteed, for the accommodation of the Cherokee agency; and the location of the same shall be designated by the Cherokee nation, in conjunction with the agent of the Government of the United States.

ARTICLE VII. This treaty, or articles of convention, after the same have been ratified, by the President and Senate shall be obligatory on the United States and said Cherokee nation.

In testimony whereof, the said Montfort Stokes, Henry L. Ellsworth, and John F. Schermerhorn, commissioners as aforesaid and the chiefs and head men of the Cherokee nation aforesaid, have hereunto set their hands, at Fort Gibson on the Arkansas river, on the 14th day of February, one thousand eight hundred and thirty-three.

Montfort Stokes,
Henry L. Ellsworth,
J. F. Schermerhorn,
John Jolly, his x mark,
Black Coat, his x mark,
Walter Webber,
Principal Chiefs:
John Rogers, president commissioners,
Glass, president council.

SIGNED, sealed, and delivered in our presence:

S. C. Stambaugh, secretary commissioners,
M. Arbuckle, colonel Seventh Infantry,
Geo. Vashon, agent Cherokees west,
Jno. Campbell, agent Creeks.
Alexander Brown, his x mark,
Jno. Hambly,
Interpreters,
William Nesbitt,
Peter A. Cams,
N. Young, major U.S. Army
W. Seawell, lieutenant Seventh Infantry,
Wm. Thornton, clerk committee
Charles Webber, clerk council.

APPENDIX C

Excerpts

TREATY WITH THE CHEROKEE, DECEMBER 29, 1835.
(7 Stat. 478, Vol. II, Kappler, 439)
Proclaimed May 23, 1836.

Articles of a treaty, concluded at New Echota in the State of Georgia on the 29th day of Decr. 1835 by General William Carroll and John F. Schermerhorn commissioners on the part of the United States and the Chiefs Head Men and People of the Cherokee tribe of Indians.

Whereas the Cherokees are anxious to make some arrangements with the Government of the United States whereby the difficulties they have experienced by a residence within the settled parts of the United States under the jurisdiction and laws of the State Government may be terminated and adjusted; and with a view to reuniting their people in one body and securing a permanent home for themselves and their posterity in the country selected by their forefathers without the territorial limits of the State sovereignties, and where they can establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition; and as may tend to their individual comfort and their advancement in civilization.

And whereas a delegation of the Cherokee nation composed of Messrs. John Ross Richard Taylor Danl. McCoy Samuel Gunter and William Rogers with full power and authority to conclude a treaty with the United States did on the 28th day of February 1835 stipulate and agree with the Government of the United States to submit to the Senate to fix the amount which should be allowed the Cherokees for their claims and for a cession of their lands east of the Mississippi river, and did agree to abide by the award of the Senate of the United States themselves and

to recommend the same to their people for their final determination.

And whereas on such submission the Senate advised "that a sum not exceeding five millions of dollars be paid to Cherokee Indians for all their lands and possessions east of the Mississippi river."

And whereas this delegation after said award of the Senate had been made, were called upon to submit propositions as to its disposition to be arranged in a treaty which they refused to do, but insisted that the same "should be referred to their nation and there in general council to deliberate and determine on the subject in order to ensure harmony and good feeling among themselves."

And whereas a certain other delegation composed of John Ridge, Elias Boudinot, Archilla Smith, S. W. Bell, John West, Wm. A. Davis and Ezekiel West, who represented that portion of the nation in favor of emigration to the Cherokee country west of the Mississippi entered into propositions for a treaty with John F. Schermerhorn commissioner on the part of the United States which were to be submitted to their nation for their final action and determination:

And whereas the Cherokee people, at their last October council at Red Clay, fully authorized and empowered a delegation or committee of twenty persons of their nation to enter into and conclude a treaty with the United States commissioners then present, *at that place or elsewhere* and as the people had good reason to believe that a treaty would then and there be made or at a subsequent council at New Echota which the commissioners it was well known and understood, were authorized and instructed to convene for said purpose; and since the said delegation have gone on to Washington City, with a view to close negotiations there, as stated by them notwithstanding they

were officially informed by the United States commissioner that they would not be received by the President of the United States; and that the Government would transact no business of this nature with them, and that if a treaty was made it must be done here in the nation, where the delegation at Washington last winter *urged that it should be done for the purpose of promoting peace and harmony among the people;* and since these facts have also been corroborated to us by a communication recently received by the commissioner from the Government of the United States and read and explained to the people in open council and therefore believing said delegation can effect nothing and since our difficulties are daily increasing and our situation is rendered more and more precarious, uncertain, and insecure in consequence of the legislation of the States; and seeing no effectual way of relief, but in accepting the liberal overtures of the United States.

And whereas Genl William Carroll and John F. Schermerhorn were appointed commissioners on the part of the United States, with full power and authority to conclude a treaty with the Cherokees east and were directed by the President to convene the people of the nation in general council at New Echota and to submit said propositions to them with power and authority to vary the same so as to meet the views of the Cherokees in reference to its details.

And whereas the said commissioners did appoint and notify a general council of the nation to convene at New Echota on the 21st day of December 1835; and informed them that the commissioners would be prepared to make a treaty with the Cherokee people who should assemble there and those who did not come they should conclude gave their assent and sanction to whatever should be transacted at this council and the people having met in couniel [sic] according to said notice.

Therefore the following articles of a treaty are agreed upon and concluded between William Carroll and John F. Schermerhorn commissioners on the part of the United States and the chiefs and head men and people of the Cherokee nation in general council assembled this 29th day of Decr. 1835.

ARTICLE 1. The Cherokee nation hereby cede relinquish and convey to the United States all the lands owned claimed or possessed by them east of the Mississippi river, and hereby release all their claims upon the United States for spoliations of every kind for and in consideration of the sum of five millions of dollars to be expended paid and invested in the manner stipulated and agreed upon in the following articles, but as a question has arisen between the commissioners and the Cherokees whether the Senate in their resolution by which they advised "that a sum not exceeding five millions of dollars be paid to the Cherokee Indians for all their lands and possessions east of the Mississippi river" have included and made any allowance or consideration for claims for spoliations it is therefore agreed on the part of the United States that this question shall be again submitted to the Senate for their consideration and decision and if no allowance was made for spoliations that then an additional sum of three hundred thousand dollars be allowed for the same.

ARTICLE 2. Whereas by the treaty of May 6th 1828 and the supplementary treaty thereto of Feb. 14th 1833 with the Cherokees west of the Mississippi the United States guarantied [sic] and secured to be conveyed by patent, to the Cherokee nation of Indians the following tract of country "Beginning at a point on the old western territorial line of Arkansas Territory being twenty-five miles north from the point where the territorial line crosses Arkansas river, thence running from said north point south on the said territorial line where the said

territorial line crosses Verdigris river; thence down said Verdigris river to the Arkansas river; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand river at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly, from the mouth of the north fork of the Canadian; thence along the said four mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand river; thence up said Grand river as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend:

Provided however That if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees; And letters patent shall be issued by the United States as soon as practicable for the land hereby guarantied [sic]."

And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi the United States in consideration of the sum of five hundred thousand dollars therefore hereby convenant and agree to convey to the said Indians, and their descendants by patent, in fee simple the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation beginning at the southeast corner of the same and runs north along the east line of the Osage lands fifty miles to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted and a prorata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agrees that the lands above ceded by the treaty of Feb. 14, 1833, including the outlet, and those ceded by this treaty shall all be included in one patent executed to the Cherokee nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830. It is, however, agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post and have no further use for the same it shall revert to the Cherokee nation. The United States shall always have the right to make and establish such post and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same and the free

use of as much land, timber, fuel and materials of all kinds for the construction and support of the same as may be necessary; provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

* * *

ARTICLE 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the Government of the same.

ARTICLE 6. Perpetual peace and friendship shall exist between the citizens of the United States and the Cherokee Indians. The United States agree to protect the Cherokee nation from domestic strife and foreign enemies and against intestine wars between the several tribes. The Cherokees shall endeavor to preserve and maintain the peace of the country and not make war upon their neighbors they shall also be protected against interruption and intrusion from citizens of the United States, who may attempt to settle in the country without their consent; and all such persons shall be removed from the same by

order of the President of the United States. But this is not intended to prevent the residence among them of useful farmers, mechanics, and teachers for the instruction of Indians according to treaty stipulations.

ARTICLE 7. The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

ARTICLE 8. The United States also agree and stipulate to remove the Cherokees to their new homes and to subsist them one year after their arrival there and that a sufficient number of steamboats and baggage-wagons shall be furnished to remove them comfortably, and so as not to endanger their health, and that a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government. Such persons and families as in the opinion of the emigrating agent are capable of subsisting and removing themselves shall be permitted to do so; and they shall be allowed in full for all claims for the same twenty dollars for each member of their family; and in lieu of their one year's rations they shall be paid the sum of thirty-three dollars and thirty-three cents if they prefer it.

Such Cherokees also as reside at present out of the nation and shall remove with them in two years west of the Mississippi shall be entitled to allowance for removal and subsistence as above provided.

* * *

ARTICLE 11. The Cherokee nation of Indians believing it will be for the interest of their people to have all their funds and annuities under their own direction and future disposition hereby agree to commute their permanent annuity of ten thousand dollars for the sum of two hundred and fourteen thousand dollars, the same to be invested by the President of the United States as a part of the general fund of the nation; and their present school fund amounting to about fifty thousand dollars shall constitute a part of the permanent school fund of the nation.

* * *

ARTICLE 19. This treaty after the same shall be ratified by the President and Senate of the United States shall be obligatory on the contracting parties.

ARTICLE 20. (Supplemental article. Stricken out by Senate.)

In testimony whereof, the commissioners and the chiefs, head men, and people whose names are hereunto annexed, being duly authorized by the people in general council assembled, have affixed their hands and seals for themselves, and in behalf of the Cherokee nation.

I have examined the foregoing treaty, and although not present when it was made, I approve its provisions generally, and therefore sign it.

William Carroll,
J. F. Schermerhorn.

Major Ridge, his x mark	(L.S.)	Te-gah-e-ske, his x mark	(L.S.)
James Foster, his x mark,	(L.S.)	Robert Rogers,	(L.S.)
Tesa-ta-esky, his x mark	(L.S.)	John Gunter,	(L.S.)
Charles Moore, his x mark,	(L.S.)	John A. Bell,	(L.S.)
George Chambers, his x mark,	(L.S.)	Charles F. Foreman,	(L.S.)
Tah-yeske, his x mark,	(L.S.)	William Rogers,	(L.S.)
Archilla Smith, his x mark,	(L.S.)	George W. Adair,	(L.S.)
Andrew Ross,	(L.S.)	Elias Boudinot,	(L.S.)
William Lassley,	(L.S.)	James Starr, his x mark	(L.S.)
Cae-te-hee, his x mark,	(L.S.)	Jesse Half-breed, his x mark,	(L.S.)

Signed and sealed in the presence of–

Western B. Thomas, secretary.
Ben F. Currey, special agent.
M. Wolfe Batman, first lieutenant, six U.S. Infantry, disbursing agent.
Jon L. Hooper, lieutenant, fourth Infantry.
C. M. Hitchcock, M.D. assistant surgeon U.S.A.
G. W. Currey,
William H. Underwood,
Cornellius D. Terhune,
John W. H. Underwood.

In compliance with instruction of the council at New Echota, we sign this treaty.

Stand Watie,
John Ridge.

March 1, 1836
Witnesses:

Elbert Herring,
Alexander H. Everett,
John Robb,
D. Kurtz,
Wm. Y. Hansell,
Samuel J. Potts,
Jno. Litle,
S. Rockwell.

* * *

APPENDIX D

Excerpts

THE UNITED STATES OF AMERICA TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians * * it was stipulated and agreed on the part of the United States, * * the United States should guaranty, secure, and convey by Patent, to the said Cherokee Nation, certain tracts of land: the description of which tracts and the terms and conditions on which they were to be conveyed, are * * in the words following, that is to say:—

"ARTICLE 2d WHEREAS, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, * * the United States guarantied and secured, to be conveyed by patent to the Cherokee nation of Indians, * * SEVEN MILLIONS OF ACRES within the whole described boundaries.

In addition to the seven millions of acres of land thus provided for and bounded, the United States further guaranty to the Cherokee nation A PERPETUAL OUTLET WEST, and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend.

PROVIDED, HOWEVER, that if the SALINE or SALT PLAIN on the western prairie shall fall within said limits * * the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees.

And LETTERS PATENT, shall be issued by the United States as soon as practicable for the land hereby guarantied.

AND WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States, in consideration of the sum of FIVE HUNDRED THOUSAND DOLLARS, * * hereby covenant and agree to convey to the said Indians and their descendants, by Patent, in fee simple, the following additional tract of land situated between the west line of the State of Missouri and the Osage reservation, beginning at the south-east corner of the same, and runs north along the east line of the Osage lands fifty miles, to the north-east corner thereof; and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land; * *

ARTICLE 3d. The United States also agree, that the lands above ceded by the treaty of February fouteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one PATENT, executed to the Cherokee nation of Indians by the President of the United States, according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty. * *

The United States shall always have the right to make and establish such POST and MILITARY-ROADS and FORTS in any part of the Cherokee country as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds for the construction and support of the same, as may be necessary, Provided, that if the private rights of individuals are interfered with, a just compensation therefor shall be made."–

AND WHEREAS, the United States have caused the said tract of Seven Millions of Acres, together with the said perpetual outlet, to be surveyed in one tract, the boundaries whereof are as follows: beginning at a mound of rocks four feet square * * on what has been denominated the old western territorial line of Arkansas Territory twenty-five miles north of Arkansas river; thence south twenty-one miles and twenty eight chains, to a post on the north-east bank of the Verdigris river; * * thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of Verdigris river on the north Bank of Arkansas river south forty-four degrees, thirteen minutes, east, fifty seven chains, to a post on the south bank of Arkansas opposite the eastern bank of Neosho river at its junction with Arkansas, * * thence south fifty three degrees west, one mile, to a post * * thence south eighteen degrees, eighteen minutes west thirty three miles, twenty-eight chains and eighty links, to a rock * * thence south four miles, to a post, on the lower bank of the north fork of Canadian river, at its junction with Canadian river, * * * thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river, four chains and fifty four links east of Fort Smith; thence north seven degrees twenty five minutes west with the western boundary of the State of Arkansas, seventy-six miles sixty four chains and fifty links, to the south-west corner of the State of Missouri; thence north, on the western boundary of the State of Missouri eight miles, forty nine chains and fifty links, to the north bank of Cowskin, or Seneca river, at a mound six feet square at base and five feet high * * thence west on the southern boundary of the lands of the Senecas, eleven miles and

forty-eight chains, to a post on the east bank of Neosho river; * * thence up Neosho river, with its meanders on the east bank, to the southern boundary of the Osage lands, thirty six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of the Neosho river; thence west on the southern boundary of the Osage lands to the line dividing the territory of the United States from that of Mexico two hundred and eighty eight miles, thirteen chains and sixty six links, to a mound of earth six feet square * * thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square * * thence east along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty six links, to the beginning, containing within the Survey thirteen millions, five hundred and seventy four thousand, one hundred and thirty five acres and fourteen hundredths of an acre.–

AND WHEREAS, the United States have also caused the said tract of Eight hundred thousand acres, to be surveyed, and have ascertained the boundaries thereof * *

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have GIVEN and GRANTED and by these presents do GIVE and GRANT, unto the said Cherokee nation, the two tracts of land so surveyed and herein before described, containing in the whole fourteen millions, three hundred and seventy four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre:

TO HAVE AND TO HOLD THE SAME, together with the rights privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain

on the western prairie, referred to in the second acticle of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty five, which salt plains has been ascertained to be within the limits prescribed for the outlet agreed to be granted by the said article; and subject also to all the other rights reserved to the United States in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are reserved and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation ceases and abandons the same.–

IN TESTIMONY WHEREOF, I, Martin Van Buren, PRESIDENT OF THE UNITED STATES OF AMERICA, have caused these letters to be made PATENT and the SEAL of the GENERAL LAND OFFICE to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the thirty-first day of December in the year of our Lord one thousand eight hundred and thirty eight, and of the Independence of the United States, the sixty third.

By the President M. VAN BUREN
M. M. GARLAND
Recorder of the General Land Office

APPENDIX E

To Commissioner of Indian Affairs

Westport, Jackson County, Mo.,
September 20, 1837.

SIR: By your instructions of July 5, 1836, I was required to cause the surveys of the Cherokee lands to be completed and to supply every deficiency connected with the subject which at that time prevented the issuing of the patent.

The surveys have been completed, the field notes of which are herewith respectfully submitted, together with duplicate plats of each tract of Cherokee land, also a summary description of the boundaries, and the quantity of acres embraced therein.

The surveys being made agreeably to the requisition of the treaty necessarily divides the Cherokee lands into two distinct tracts, the northeast corner of the one approaching the southwest corner of the other, within a distance of 30 chains. This intervening tract is a slip of unappropriated land lying north of the Quapaws, 1 mile 45 chains and 50 links wide, and extending from the Neosho River, the place where the two Cherokee tracts approach each other, east 25 miles 36 chains and 24,813.39 acres.

The second article of the Cherokee treaty provides that if the salt plain at which the Indians of the various tribes procure salt "should fall within the Cherokee lands, the right should be reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees."

It appears there are two noted places at which the Indians, from time immemorial, have collected salt. *One is on the Cherokee lands.* It is a plain on which salt is formed by solar evaporation, situated on the salt fork of

Arkansas River, about 15 or 20 miles south of their northern boundary and about 220 miles west of the State of Missouri.

The other is said to be a salt rock. It is on Creek lands, 8 or 10 miles south of the southern boundary of the Cherokee lands and about 200 miles west of the State of Arkansas.

The surveyor was unable to visit either of these places; but Osage Indians, who were hunting in the vicinity at the time he passed, pointed out to him the location of both.

Notwithstanding the Cherokee lands are divided into two separate tracts, the second article of the treaty requires both to be included in the same patent.

The fifth article of the treaty requires that the laws which the Cherokees may enact shall be consistent "with such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians." Also, the third article stipulates that the patent to be issued shall be "according to the provisions of the act of May 28, 1830." This act provides that the lands patented "shall revert to the United States if the Indians become extinct or abandon them."

Therefore, while it is required that a patent should secure the lands to the Cherokees and their heirs and successors, it provides that it withholds from them the right to convey the same to other Indians.

To this matter I beg leave to solicit particular attention. It is the hinge upon which turns the weal or woe of all the tribes for which the Government is making provision in this Indian Territory, and vitally affecting the benevolent design of the Government in securing to the tribes the possession of their lands.

If the conveyance be made in terms which could hereafter, by possibility, be construed to authorize the Indians, either collectively or individually, to convey the whole, or any portion thereof, to others than Indians, either forever or for a limited time, white residents would be introduced and the Indian crowded out.

Last winter four chiefs of the Delaware Nation, professing to act by authority and in behalf of the whole, were induced to petition the Government for permission to lease to a certain white man (a citizen of the United States) and his children one section of land. I mention this fact, known to yourself, as an evidence that between the citizens of the United States and the Indians negotiations have already been commenced by which the former hope to obtain a footing within the Indian Territory.

In issuing the patent it will be necessary *to do more* than to guard against *selling* and *leasing*. These two avenues to the ingress of white population being effectually barred, a third will be sought under the pretext of being employed to perform some useful service for the Indians. If an Indian be allowed to introduce a white man into the Indian country as a partner in business, as a clerk, as a laborer, as a physician, or in any capacity whatever, indulgence will be abused by avaricious individuals, or companies of Indians will be hired to form either nominal or real contracts for the introduction of white men, under the name of employes (sic) of the former.

None of the tribes are capable of guarding their own interests, and if they were, in such transactions as these under consideration human nature should not be supposed to be beyond the influence of the temptations of money. The right of introducing into the Indian country any white persons, citizens of the United States or of any other country, can never be safely possessed by any of the tribes until their condition becomes so improved

that they can mingle with the white men without inconvenience.

In the present condition of the tribes, this subject is guarded by laws of Congress, but if the right to the soil be conveyed to the Indians by patent, without reserving in the same instrument their right of connecting white men with them in the occupancy of the land, the power of Congress subsequently to forbid it by law may well be doubted.

This subject acquires importance from the following facts, which I hope will apologize for the earnestness with which I respectfully press its consideration, namely, the case of the Cherokees, now under consideration, is the first that has occurred of issuing a patent to an Indian tribe. The whole or portions of twenty-three tribes are already within this Indian Territory. In all probability the number of tribes will soon exceed thirty. The patent now to be issued will be quoted as a precedent for the future, and no tribe will be content with less authority than is granted to the Cherokees. But irrespective of other tribes, the introduction of white men into the Cherokee country alone would prostrate the designs of the Government to render the Indians secure in their possessions; for the Cherokee lands, embracing in the whole more than 14,000,000 acres, extend from the east to the west of the country designed for Indian settlement and divide in two.

We can not consistently plead, in this case, that if the Indians choose to introduce white men into their country to their own destruction the fault will be theirs, not ours. The same might have been pleaded heretofore in relation to the laws for the preservation and welfare of the Indian tribes. Justice toward a very large majority of them, who are incompetent either to understand or take care of their own interests, and humanity toward the

whole, requires that our Government continue its guardianship.

By the prohibition above alluded to, no inconvenience could arise to any Indians whose circumstances require the assistance of white men. The matter being under the control of the Government of the United States, its laws regulating intercourse with the Indian tribes could always be such as to provide for the emergency. Laws providing for the temporary residence of white men in the Indian country either, for the benefit of the Indians or the Government of the United States, can be amended or repealed whenever their provisions are found to be exceptionable, but the patent under consideration will be unalterable. Of this I presume the Government will be fully aware, and will guard against wiles which afterwards it would be unable to remedy, and which would produce a failure of the experiment so auspiciously entered upon by the Government for the improvement of the condition of this hitherto unfortunate race of men.

Sir, I have the honor to be, with great respect, your obedient servant, (Emphasis supplied)

ISAAC McCOY.

APPENDIX F

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS,
"Washington, D. C., May 11," 1886.

The Honorable,
The Secretary of the Interior.

SIR:–

I have the honor to state that on the 17th of March. 1886, G. W. Harkins, and H. F. Murray, Chickasaw Delegates, addressed a letter to this office, requesting to be informed whether any part of the territory of the Cherokee nation lies south of the Arkansas River, at or near Fort Smith, (Arkansas) or at any other point below the mouth of the Canadian River, to which this office replied on the 26th of the same month, stating that none of the territory of said nation lies south of the Arkansas River, at any point below the mouth of the Canadian River, referring to the treaty with the Cherokees of December 29th, 1835, (7 Stat. 478) and the treaty with the Choctaws and Chickasaws, of June 22nd, 1855, (11 Stats. 611) as showing the boundaries between said nations.

I would further state that I am in receipt, by the hands of Hon. Van H. Manning, of a letter from Frank M. Morgan, a Cherokee Indian, dated March 31st, 1886, and a letter from E. C. Boudinot, also a Cherokee Indian, bearing same date, enclosing therewith a map purporting to show the boundaries between the Choctaw and Cherokee nations near Fort Smith, Arkansas, and a letter from the Adjutant General U.S.A., to Mr. Manning, dated the 23rd of same month, relative to the location of Fort Smith, Arkansas, and enclosing therewith a copy

of a tracing of the Fort, made by the Engineers' Department, from the deed of 1838. Mr. Morgan and Mr. Boudinot, request that this office will investigate and determine the location of the boundary lines between the Choctaw and Cherokee nations, near Fort Smith, Arkansas, to the extent necessary to ascertain to which of said nations a certain tract of land, containing about four acres, situated on the south side or bank of the Arkansas River, near Fort Smith, belongs. Mr. Morgan claims that, as a Cherokee Indian citizen, he has taken possession of said land—the location of which is designated by the map accompanying his letter,—as a portion of the Cherokee national domain, and that in violation of his rights, Campbell Leflore, a Choctaw Indian, claims that said land is included within the boundaries of the Choctaw nation. Mr. Morgan refers to the treaties with said nations, and to the patent issued to the Cherokees, on December 31st, 1838, as showing that said tract of land is included within the boundaries of the Cherokee nation.

I am also in receipt of a letter from Mr. Leflore, as "Special Delegate of the Choctaw Nations", dated the 9th ultimo, relative to the same matter, enclosing therewith a communication to him from Edmund McCurtain, Principal Chief of Choctaw Nations, dated March 22nd, 1888, authorizing him to present the matter of the claim of Mr. Morgan "to a part of the territory of the Choctaw nation, and an attempt to occupy the same in violation of the treaties between the United States and the Choctaws and Chickasaws", with a view to having the United States determine the question of boundary, to the point in controversy; a notice from Mr. Leflore, dated March 24th, 1886, to Mr. Morgan, protesting against Morgan's intrusion upon said tract of land; Mr. Morgan's acknowledgment of the receipt of the notice, and stating that he would occupy said land until removed by the proper authorities; a letter from G. W.

Harkins to Mr. Leflore, dated the 8th of March, 1886, stating that Chief Bushyhead of the Cherokee nation, had informed Mr. Harkins, in reply to his statement that a Cherokee had claimed Choctaw lands, and intended building a house on the land owned and occupied by Mr. Leflore; that several years since, this same party had written him while in this city, to examine the boundary line between the Choctaws and Cherokees, which he did, and that it appeared from the map in the Department, that the Cherokees had no claim "south of the middle of the river channel of the Arkansas, and that he further voluntarily said, the Choctaw authorities could remove him and his effects as an intruder. Mr. Leflore also enclosed with his letter, a map of a part of the Indian Territory, adjacent to Fort Smith, purporting to show the boundaries between the Cherokee and Choctaw nations in that vicinity, and the location of the land in dispute; also a certified copy of a tracing of a portion of the map of the re-survey of the boundary line between Arkansas and the Choctaw lands, executed by H. E. McKee, U.S. Surveyor, under his contract, bearing date March 12th, 1877. Mr. Leflore claims that the right of Mr. Morgan to enter upon the lands of the Choctaw nation, is based upon the assumption that the lands belonging to the Cherokee nation extend south of the Arkansas River, at Forth Smith, and states that the baseless character of such claim requires no discussion, and requests, in behalf of the Principal Chief of the Choctaw nation, that the United States Agent for the Choctaw nation, be directed to remove Mr. Morgan and his property, improvements, and effects, from said lands, as provided in Section 2147 of the Revised Statutes.

Relative to this, I have to say that the preamble to the treaty with the Cherokees, made July 8th, 1817, (7 Stats. 156) declares that the Cherokees under authority from the President of the United States, given January 9th, 1809, "did explore the country on the west side of

the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon United States lands, to which no other tribe of Indians have any just claim, and have duly notified the President of the United States thereof."

The 5th Article of said treaty provides that–

> "The United States bind themselves in exchange for lands ceded in the first and second articles hereof, to give to that part of the Cherokee nation on the Arkansas, as much land on said river and White river, as they have, or may hereafter receive from the Cherokee nation east of the Mississippi, acre for acre, as the just proportion due that part of the nation on the Arkansas, agreeably to their numbers; which is to commence on the north side of the Arkansas river, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line northwardly to strike Chataunga Mountain, or the hill first above Shield Ferry, on White River, running up between said rivers for complement, the banks of which rivers to be the lines; and to have the above line from the point of begining to the point on White River run and marked, which shall be done soon after the ratification of this treaty."

By Article 2 of the treaty with the Choctaws, made October 8th, 1820, (7 Stats. 210) the United States granted to the Choctaws, in consideration of the cession to the United States, of certain lands east of the Mississippi, described in Art. 1 of the treaty,

> "a tract of country west of the Mississippi River, situated between the Arkansas and Red rivers, and bounded as follows–Beginning on the Arkansas River, where the lower boundary line of the

> Cherokee strikes the same, thence up the Arkansas to the Canadian Fork, and up the same to its source; thence due south to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

The 3rd Article of the treaty provides that the boundaries of said lands shall be ascertained and marked by a commissioner or commissioners to be appointed by the United States.

By the 1st Article of the treaty with the Choctaws, made January 20th, 1825, (7 Stats. 234) the Choctaws ceded to the United States,

> "all that portion of the landed ceded to them by the 2nd Article of the treaty of Doak Stand, (October 18, 1820) lying east of a line beginning on the Arkansas, one hundred paces east of Fort Smith, and running thence due south, to the Red River; it being understood that this line shall constitute and remain the permanent boundary between the United States and the Choctaws."

Article 1 of the treaty of May 6th, 1828, with the Cherokees, (7 Stats. 311) provides that

> "the western boundary of Arkansas shall be, and the same is hereby defined, viz: a line shall be run, commencing on Red River, at the point where the eastern Choctaw line strikes said river, and run due north with said line to the River Arkansas, thence in a direct line to the southwest corner of Missouri."

By Article 2 of the threaty, the United States agreed to possess the Cherokees, and to guarantee it to them

forever, 7,000,000 acres of land to be bounded as follows, viz:–

> "Commencing at that point on Arkansas River, where the eastern Choctaw boundary line strikes said river, and running thence with the western line of Arkansas, as defined in the foregoing article, to the southwest corner of Missouri, and thence the waters of Neosho, generally called Grand River; thence due west to a point from which a due south course will strike the present northwest corner of Arkansas Territory; thence continuing due south, on and with the present western boundary line of the Territory, to the main branch of Arkansas River; thence down said river to its junction with the Canadian River, and thence up and between the said rivers Arkansas and Canadian, to a point at which a line running north and south from river to river, will give the aforesaid 7,000,000 of acres. In addition to the 7,000,000 of acres thus provided for, and bounded, the United States further guarantees to the Cherokee nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of soil extend."

In the 3rd Article of the treaty, the United States agreed to have the lines of the above cession run without delay.

In the 7th Article of the treaty, the Cherokees surrender to the United States all the lands to which they were entitled in Arkansas, and which were secured to them by the treaty of 8th of January, 1817, and the convention of the 27th of February, 1819. By the 2nd

Article of the treaty of September 20th, 1830, with the Choctaws, (7 Stats. 333), the

> "United States under a grant specially to be made by the President of the U.S., shall cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them, while they shall exist as a nation, and live on it, beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City, in the year 1825."

By Article 1 of the treaty of February 14, 1833, with the Cherokees (7 Stats. 414), the United States agree to

> "possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby pledged of 7,000,000 acres of land to be bounded as follows, viz:—Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point where the territorial line crosses the Arkansas River; thence running from said north point, south on the said territorial line, to the place where said territorial line crosses the Verdigris River; thence down said Verdigris River to the Arkansas River; thence down said Arkansas, to a point where a stone is placed opposite to the east or lower bank of Grand River, at its junction

with the Arkansas; thence running south forty-four degrees west, one mile; thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian; thence along the said four miles line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas, where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand River, as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line, extended west if necessary, and a line drawn due west from the point of beginning, to a certain distance west, at which a line running north and south from said Osage line, to said due west line, will make seven million of acres within the whole described boundaries."

The treaty also gives to the Cherokees a perpetual outlet west. By the 2nd Article of the treaty the Cherokees:

> "relinquish and quit claim to the United States all the right, interest and title which the Cherokees have or claim to have in and to all the land ceded or claimed to have been ceded to said Cherokee nation by said treaty of May 6th, 1828, and not embraced within the limits or boundaries fixed in this present supplementary treaty or Articles of convention and agreement."

On March 23rd, 1842, a patent was issued to the Choctaws in pursuance of the treaty of 1830, (as ratified

by the Senate of the United States on the 24th of February, 1831), for the following described lands, to wit:–

> "Beginning near Forth Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork, if in the limits of the United States, or to those limits; thence due south to Red River and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825."

By the 3rd Article of the treaty with the Cherokees, made December 29th, 1835, (7 Stat. 478), it was agreed that the lands ceded to the Cherokees by the treaty of February 14th, 1833, including the outlet, and the lands ceded to them by the 2nd Article of the said treaty of December 29th, 1835, shall be included in one patent executed to the Cherokee nation of Indians, by the President of the United States, according to the provisions of the act of May 28, 1830.

On December 31, 1838, a patent was issued to the Cherokee nation in pursuance of the treaties of May 6, 1828, February 14, 1833, and December 29, 1835, for two tracts of land, the boundaries of which, so far as bearing upon the question at issue, are here quoted:

> "thence down the Canadian River, on its north bank to its junction with Arkansas River, thence down the main channel of Arkansas River to the western boundary of the state of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas River four chains and fifty-four links east of Fort Smith; thence north seven

> degrees, twenty-five minutes west with the western boundary of the state of Arkansas, seventy-six miles, sixty-four chains and fifty links, to the southwest corner of the state of Missouri."

By the treaty with the Choctaws and Chickasaws, made January 17th, 1837, (11 Stat. 573), the Chickasaws were given a district in the Choctaw country.

By the treaty of June 22nd, 1855, with the Choctaws and Chickasaws, (11 Stat. 611), Article 1, the boundaries of the Choctaws and Chickasaw country and fixed as follows, to wit:–

> "Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red River, thence up Red River to the point where the meridian of one hundred degrees West longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River, thence down said river to the place of beginning."

By the 19th Article of the treaty, the United States agree to cause the eastern and western boundary lines of said country, described in the 1st article, and the western boundary of the Chickasaw district as defined in Article 2 of the treaty, to be run and permanently marked.

By the 21st Article of the treaty with the Cherokees, made July 19th, 1866, (14th Stat. 799) it is provided, that

> "it being difficult to learn the precise boundary line between the Cherokee country and the states of Arkansas, Missouri and Kansas, it is agreed

that the United States shall, at its own expense, cause the same to be run as far west as the Arkansas, and marked by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council."

On December 24th, 1821, Henry D. Downs, Commissioner &c., made his report to the Secretary of War, of a survey which he had been directed to make of the Choctaw boundary line west of the Mississippi, enclosing the field-notes and map of same, (but the map cannot be found), Mr. Downs states that he made such survey,

"beginning at the mouth of Little River, running thence down Red River to a point three miles below the mouth of Little River, running thence north twenty-nine degrees and fifteen minutes east, one hundred and fifteen miles, ten chains, and fifty links, to a post on the south bank of the Arkansas River, where the lower boundary line of the Cherokees strikes the same; running thence with the course of the Arkansas River, to the mouth of the Canadian Fork."

The following is an extract from Mr. Downs' field-notes:

"Sunday, 23rd, at 115 miles, 10 chains and 50 links, the south bank of the Arkansas River, the corner post marked on the south side M. 115, 10 chs.; 50 links, on the west side C.N., on the east side U.S., distance from the Cherokee corner on the north bank of the river, one mile and thirty chains, Arkansas River 630 yards wide. October 4th started from a post on the south side of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas."

The difference in the statement of the surveyor as to the width of the Arkansas River, 630 yards, and the distance from the Cherokee corner on the north side of the river, one mile and 20 chains, can be accounted for from the fact that the course of the river at that particular point bears north, as appears from the plats, at an angle of about 45 degrees.

A second survey of the eastern Choctaw boundary was made in 1825, by Mr. Conway, under instructions from the War Department, and a plat and field-notes of the same was forwarded to said Department on January 1", 1826 (but the field-notes cannot be found). From the plat it appears that the northern terminus of said line is at a point on the south bank of the Arkansas River, or in the channel of the River.

In 1831-32, Isaac McCoy, under instructions from the War Department, surveyed the Cherokee line from the southwest corner of Missouri to Fort Smith, on the Arkansas River (John Donelson, asst. surveyor). The following is an extract from the field-notes of the survey–

> "Miles 76. Thence at 12.50 chains left the cane-brake and entered an open prairie bottom-rich soil, 50 chains to cane again; 80 chains to the north bank of Arkansas River–set a stake and made round it, from which L 64° 20′ W. a cottonwood, marked C. L. 76 M. S. 36° 00′ E. a cottonwood marked U.S. 76 M. At this point is fixed the southeast corner of the Cherokee lands, 77M. Thence along the channel of the river 64.50 chains to the south bank where the northern extremity of the eastern boundary of the Choctaw lands strikes the Arkansas River."

As the landmarks of the eastern Choctaw boundary were growing dim from age, the boundary was retraced

by order of the Commissioner of Indian Affairs in 1858. This work was accomplished by Deputy Suveyors, A. H. Jones and H. M. C. Brown, and was in accordance with a provision of the treaty with the Choctaws and Chickasaws of January 22", 1855 (11 Stats. 611). The surveyors beginning their work at the northern end of the line, soon reported that the old line run by the first surveyor, diverged westward from what they found to be a true south line, and they were thereupon directed by the Commissioner to confine their labor to retracing and marking the old line as run by Commissioner Downs, in 1825, which they did and submitted a report of the same, together with a plat and field-notes of the survey. Messrs. Brown and Jones state in their report and field-notes, that,

> "upon our arrival at Forth Smith, we found the army officers had carefully preserved full evidence of the eastern boundary of the Chickasaw and Choctaw country at intersection with the south bank of the Arkansas River; by establishing and planting a large post, satisfactory evidence exists of the most easterly angle of Old Fort Smith, which was fully identified by several of the old inhabitants of this country and which is about 100 paces due west of the line, showing a practical coincidence with the specifications contained in the 1st Article of the treaty dated June, 1855. We became fully satisfied, especially after running a trial line two miles south and discovering the old blaze marks, that this post as previously established by the army officers, was a true and correct point, and actually on the old original line as run by J. T. Conway in the month of November, 1825, under the supervision of Mr. Downs' Commissioner. Therefore commence at said post, and run south –January 21, 1858–variation of true meridian

found to be 10.50' East, 4 chains, 00 links, X rood course east 4 chs., 15 lks. Enter military enclosure, 10.80 to a point selected as a proper and durable position to erect and build a stone monument as an "Initial Point" agreeably to the 5th section of our general instructions. The reason that this distance has been selected, is to avoid in all future time the washing and wearing away of the south bank of the Arkansas River which in 32 years, or since Mr. Downs made the original survey, has washed at least 10 chains.

"The monument now erected is of solid masonry 6 ft. high, well laid in mortar, with each side facing the cardinal points and having the following graved characters, to-wit: The cubical block planted upon the top, has engraved on the north side "Initial Point", on the east side "Arkansas", on the west side "Choctaw", on the south side "1858".

In accordance with the provisions of the treaty with the Cherokees of July 19", 1866 (14 Stat. 799), the boundary lines between the Cherokee country and the state of Arkansas, Missouri and Kansas, were surveyed under instructions from the Commissioner of Indian Affairs in 1871, under a contract agreed upon by Hon. Commissioner James M. Ashley, on the part of the United States, and Hon. Commissioner John S. Adair, on the part of the Cherokee nation, and Daniel P. Mitchell, United States Deputy Surveyor. Commissioners Ashley and Adair, submitted a report of the above with a plat and field-notes of the survey, from which it *appears that the initial monument of the Choctaw boundary*, heretofore described, which was placed at a safe distance south of the Arkansas River, was erroneously taken as the southern terminal point of the Cherokee boundary.

In the year 1877, H. E. McKee was employed as surveyor by the Secretary of the Interior, under authority of the act of Congress, approved March 3", 1875, entitled "An act to establish the boundary line between the state of Arkansas and the Indian country" to retrace and mark the boundary line between the state of Arkansas and the Indian country, as originally surveyed and marked, and upon which the lines of the surveys of the public lands in Arkansas were closed, and found the same to run westward, from what he found the boundary line would be if run due south to Red River, from the point on the Arkansas River 100 paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river. The stone monument erected by Brown and Jones in 1858, and known as the "initial point" is 26.15 chains south of a point *in the Arkansas River, supposed to be the corner common to the Choctaw and Cherokee lands.* This initial monument was the starting point of the retracement of the Choctaw boundary by Deputy McKee, north to the Arkansas River, and south to Red River, upon the completion of which a meridianal or true treaty line was extended to the north bank of Red River. This latter line was run but not permanently marked, its sole object being to determine the quantity of land embraced between it and the established boundary, in order that the Indians might be properly compensated for the area of land unintentionally added to the state of Arkansas by the original survey of 1825. Deputy McKee submitted his report of the survey with plat and field notes of the same. The following is an extract from the field notes of the survey of the eastern Choctaw boundary, to wit:–

"Thence north measure counting from Initial Point 8.27 chains to north side of old warehouse 125 links through it on line 10.80 chains to south bank of Arkansas River. This was the starting point for Brown and Jones' measure on

> the first mile, and makes that mile 84 chains in length. The post at this point having disappeared, I set a sandstone 36 x 12 x 4 in. 10.45 chains north of initial point, marked Choc. on the west side, and Ark. on east side. Thence 12.49 chains a point near edge of water, from which run a base line of E. 350 links to a point from which a flag on the line at point on sand-bar in the Arkansas River, being N. 14.38' W. Distance from west end of the base line to flag, 13.40 chains, 12.15 chains a point on sand-bar in river for north end of Choctaw boundary line."

The following is an extract from said field-notes, relative to the survey of the eastern Cherokee line, to wit: "south 8.15' East on a random line, variation 9.05' East. From temporary 76 mile corner 16.52 chains left bank of Arkansas River–Run base S. 32' W. 23 chs. flag on random line on sand-bar, bears south 40 West –Distance to flag 41.57 chains 58.09 chains. Distance to flag (in advance of temporary post) 57.83 chains to a point 00.60 chains north 81¾' E. of the temporary post which marks the north end of the Choctaw line."

The plats of the survey of both the Choctaw and Cherokee east boundary line, shows that *said lines meet* at the point designated on said sand-bar in the Arkansas River.

The Act of March 3, 1875, provided that the boundary line between the state of Arkansas and the Indian country, as originally surveyed and marked, and upon which the surveys of the public lands in the state of Arkansas were closed, should be the permanent boundary line between said state and the Indian country; and that said boundary line should be retraced and marked, and that any monuments set up in any former survey, indicating any line at variance with the survey provided for in such act, should be obliterated.

The following is an extract from the Instructions from the General Land Office to H. E. McKee, November 12, 1877.

> "The line to be retraced by you, however, is that established by the retracement of Brown and Jones in the year 1858; but your attention is called to the fact that the starting point of this survey is the monument marked on the diagram as "initial point" which is shown to be 26.15 chains south of the true northeast corner of the Choctaw lands, and which has been hereinbefore described as being in the bed of the Arkansas River."

On June 13, 1881, the Choctaw nation filed a petition against the United States in the Court of Claims, setting forth sundry claims against the United States, among which was one for the value of 136,204.02 acres of land, erroneously taken from the Choctaw nation by the variation between the eastern Choctaw boundary, as fixed by the various treaties and as run by Deputy McKee in 1877, and the boundary established by the United States under the erroneous survey of 1825, and on the 1st of March, 1886, the said court decided that the Choctaws were entitled to the value of said 136,204.02 acres as against the United States, and gave judgment accordingly, from which the U.S. appealed, and such appeal is now pending before the U.S. Supreme Court, the Court thereby recognizing the lines established by McKee, of both the survey of 1825, and the true treaty line.

"The treaties, surveys, and all contemporaneous correspondence show that the Arkansas River is the boundary between the Cherokee and Choctaw countries. The mere fact that the monument representing the initial point, was set 10.80 chains south of the Arkansas River, in order to avoid its washing away in the future, cuts no

figure in the matter. The survey shows how far south of the river the monument was placed, and the object had in view in placing it there, giving the distance of its location from the river, from whence the survey must have commenced, in order to determine that that point is 10.80 chains south of the river."

It is shown that the course of the river has gradually changed to the southward, and as the boundary of the Cherokee country, as fixed by the treaty, is the Arkansas River, there is no possible way by which the Cherokees can obtain any right to land south of that river. In fact the case is so plain and clear to my mind, that further comment seems unnecessary.

I herefore have the honor to recommend that authority be granted for the removal of the said Frank M. Morgan from the land in question.

The original papers are herewith enclosed, with request for their return with your decision in the premises.

Very respectfully,
Your obdt. servant,

I. D. C. ATKINS
Commissioner.

(Cooper)

APPENDIX G

March 16, 1835, President Jackson, addressing the Cherokees east of the Mississippi River, said:

"* * * A number of your brethren, who have been delegated by that portion of your people favorable to emigration, have repaired to this place in the hope of being able to make some arrangement which would be acceptable to the Government of the United States and which would meet your approbation.* * * The whole subject has been taken into consideration and an arrangement has been made, which ought to be, and I trust will be, entirely satisfactory to you. The Senate of the United States have given their opinion of the value of your possessions, and this value has been insured to you in the arrangement which has been prepared. * * *The stipulations contained in this instrument (treaty, March 14, 1835) are designed to * * * lay the foundation of such social and political establishments in your new country as will render you a happy and prosperous people.* * * The United States have assigned to you a fertile and extensive country, with a very fine climate adapted to your habits, and with all the other natural advantages which you ought to desire or expect.

"I shall, in a short time, appoint commissioners for the purpose of meeting the whole body of your people in council. They will explain to you more fully my views and the nature of the stipulations which are offered to you.

"These stipulations provide, first, for an addition to the country already assigned to you west of the

Mississippi, and *for the conveyance of the whole of it by patent in fee simple, and also for the security of the necessary political rights, and for preventing white persons from trespassing upon you.* * * * There are 13,000,000 acres conveyed to the Western Cherokees and yourselves by former treaties, and which are destined for your and their permanent residence, so that your whole country west of the Mississippi will contain not less than 13,800,000 acres."* * * (Emphasis supplied)

APPENDIX H

Hon. C. A. HARRIS,
Commissioner of Indian Affairs.

(Idem, p. 988-Talk of Special Agent Mason to Cherokee council, at Red Clay, East Tennessee, July 31, 1837.)

Brothers, the President hopes you will see the force of the reasons he has given why you can not remain here, and that you will go contentedly and quietly to your new country. The Government will faithfully fulfill all the stipulations and engagements which it has contracted with you, and its earnest desire is to see you, prosperous and happy, and permanently settled in the fine country provided for you, where you will never again be disturbed. Brothers, is there among good men a father who could see his children exposed to dreadful dangers and not make every effort to snatch them away at once and place them in safety? The President feels for you as a father for his children. He sees you here exposed to fatal influences which are working for your destruction, and he earnestly desires to place you beyond their reach; hence his anxiety to see you safe in the new and distant country he has set apart for you. Once there and these fatal influences cannot reach you. Here you are pent up within narrow limits, and with difficulty many of your people find even a scanty subsistence. There you have a wide country to yourselves, where the industrious cultivator of the soil will reap his crops in peace and security, and where the hunter will find game in abundance. *Here you are subjected to laws, in the making of which you have no voice; laws which are unsuited to your customs and abhorrent to your ideas of liberty. There, Cherokees, you will make laws for yourselves, and establish such government as in your estimation may be best suited to your condition. There, Cherokees, in your new country you will be far beyond the limits or jurisdiction of any State or Territory. The country will be yours, yours exclusively. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man.* * *
(Emphasis supplied)

APPENDIX I

OKLAHOMA HISTORICAL SOCIETY

FOUNDED MAY 27, 1893
HISTORICAL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105

That you may better understand the few documents among the Cherokee records having to do with the licenses to prospect for and engage in the mining and selling of Gravel and Sand in the Nation, I am enclosing typewritten copies of same.

I also checked Cherokee Vol. 336, Register of Mineral Licenses and find the following:

Issued to	Date	No of years	Mineral	Location
H. H. Trott	4/12/83	10 years	Gravel	Sequoyah Dist.
Narcissa Owen	1/11/87		Gravel	Illinois Dist.
Robert L. Owen	1/11/87		Gravel	Illinois Dist.
C. Koehler	6/18/89	10 years	Sand	Canadian Dist.
Connell Rogers	8/27/90	10 years	Stone & Gravel	Illinois Dist.
Wm. P. Ross, Jr. Rufus O. Ross Charles Smith	2/23/91	20 years	Gravel & Stone	Illinois Dist.
A. O. Cowan	7/28/93	20 years	Gravel	Cooweeskoo Dist.
Kate Rogers	7/10/93	20 years	Gravel	Illinois Dist.
W. P. Ross & Co.	6/26/93	20 years	Gravel	Illinois Dist.
Connell Rogers	9/29/93	20 years	Gravel	Illinois Dist.
R. M. Walker	5/29/93	20 years	Gravel	Illinois Dist.

The only time I find any mention of payment of royalty, was on June 30, 1893 Connell Rogers certified he sold 25 cubic yards of Gravel from his lease below Railroad bridge on Grand River in Ill. Dist. during quarter ending 7/30/93 and fiscal year ending 9/30/93 and that there was due the nation for the tax, $.50.

Sincerely,
Rella Looney
Archivist, Indian Archives

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This is to certify that I, LaJeanne McIntyre, am the Chief Clerk of the Oklahoma Historical Society; that the above and foregoing is a true and correct copy of "Register of Mineral License" dated Apr. 12, 1884 to Mar. 9, 1891 as it appears in file entitled (or volume No. 336, p. 2, 10 & 44), of the Cherokee Nation, formerly in the custody and control of the Secretary of the Interior and the Superintendent for the Five Civilized Tribes Agency, at Muskogee, Oklahoma, and since transferred to and now in the custody and control of the Oklahoma Historical Society, at Oklahoma City, Oklahoma, by authority of the Act of Congress, of March 27, 1934 (Public No. 133) and that by said act of Congress I am the officer and person authorized to certify to the same.

/s/ LaJeanne McIntyre
Chief Clerk
Oklahoma Historical Society

Oklahoma City. Oklahoma

May 12, 1969

[SEAL]

No.	To Whom Issued	When Issued	No. of Years Issued For	Kind of Mineral	District	Name of Firm	Names of Sureties	Post Office
1	H. H. Trott [Ex. April 12, 1885	April 12, 1884	10 yrs.	Gravel	Sequoyah	H. H. Trott	F. G. Allen J. T. Cunningham F. H. Cass	Unita, I.T.
2	Henry Effert [Ex. April 14, 1886	April 12, 1884	10 yrs.	Stone Coal	Coowerskower	Henry Effert	W. L. Trott F. G. Allen	Unita, I.T.
3	Robt. D. Blackstone	May 23, 1884	10 yrs.	SandStone	Canadian	Robt. D. Blackstone	Stephen Carlisle & R. E. Blackstone	[Expired]
(4)	D. B. Comak [Ex. July 1, 1887	May 26, 1884	10 yrs.	Stone Coal	Coowerskower	D. B. Comak	E. Southerland R. M. Allen J. M. Thomson M. Frazer	Unita, I.T.
5	Albert McGhee [Ex. May 28, 1886	July 25, 1884	10 yrs.	Stone Coal	Coowerskower	Albert McGhee	W. H. Brown Henry Wilson John H. McGhee Henry Goddard	Chitopa, Kan. (License Returned Oct. 10, 1887,
6	Geo. W. Thornton	July 25, 1884	10 yrs.	Stone Coal	Coowerskower	Geo. W. Thornton	A. B. Lucky G. W. Lucky	Unita, I.T.
7	John H. McGhee	July 25, 1884	10 yrs.	Stone Coal	Coowerskower	John H. McGhee	Albert McGhee John Caldwell H. M. Wilson M. Harland	Chitopa, Kan.
8	Robt. Dobkins [Ex May 11, 1886]	July 26, 1884	10 yrs.	Stone Coal	Coowerskower	Robt. Dobkins	G. W. Walker James Thornbaugh R. H. Fields	Unita, I.T.
9	J. C. Barker [Ex. Aug. 4, 1885]	Aug. 14, 1884	10 yrs.	Stone Coal	Coowerskower	J. C. Barker	Henry Fallen R. H. Fields W. H. Brown A. A. Kelley	Chitopa, Kans.

No.	To Whom Issued:	When Issued	No. of Years Issued For	Kind of Mineral	District	Name of Firm	Names of Sureties	Post Office
39	Wm. McCracken	Nov. 3, 1886	10 yrs.	Stone Coal	Coowerkoower	Wm. McCracken	D. W. Lipe Wm. Howell Albert Morris	Choctaw, I.T.
40	D. W. Lipe	Nov. 13, 1886	10 yrs.	Stone Coal	Coowerkoower	D. W. Lipe	Wm. Howell Albert Morris Conell Rogers	
41	Laura Schrimsher [Ex Apr. 1, 1887]	Dec. 4,	5 yrs.	Stone Coal	Coowerkoower	Laura Schrimsher	A. H. Kelly G. W. Green	Unita, I.T.
42	Wm. Howell [Ex Dec. 17, 1887]	Dec. 17, 1886	5 yrs.	Stone Coal	Delaware	Wm. Howell	D. W. Lipe Conell Rogers Albert Morris	Prairie City, I.T.
43	Robert & Narcissa Owen	July 11, 1887		Gravel	Illinois	Narcissa Owen	Robert L. Owen	Muskogee, I.T.
44	Robt. L. Owen	July 11, 1887		Gravel	Illinois	Robt. L. Owen	J. S. Stapler	Muskogee, I.T.
45	H. H. Loflin	Jan. 12, 1887		Stone Coal	Coowerkoower	H. H. Loflin	B. W. Alberty A. H. Bach M. W. Dial N. H. Dial W. G. Ward	"
46	Geo. Bullatte	Jan. 26, 1887	10 yrs.	Stone Coal	Coowerkoower	Geo Bullatte	Kale Starr R. F. Wyly R. M. French	Claremore, I.T.
47	Wm. McCracken Van Chambers [In force 1888]	Mar. 1, 1887	10 yrs.	Stone	Coowerkoower	Chambers & McCracken	J. Thompson	Claremore, I.T.
48	Thos. B. French [Ex Mar. 8, 1888]	Mar. 8, 1887	10 yrs.	Stone Coal	Illinois	P. B. French	E. C. Boudinot T. F. French	Ft. Gibson, I.T.

No.	To Whom Issued	When Issued	No. of Years Issued For	Kind of Mineral	District	Name of Firm	Names of Sureties	Post Office
60	J. A. Scales O. P. Brewer	Feb. 13, 1891	20 Years	Lead and Copper	Illinois	Brewer & Scales	James C. Buchanan R. E. Blackstone	Webbers Falls Ind. Ter.
61	Wm. P. Ross, Jr. Rufus O. Ross Charles Smith	Feb. 23, 1891	20 Years	Gravel, Stone	Illinois	Ross, Smith and Ross	S. D. Clark W. T. Harmage W. W. Ross J. W. M. Spaddin Joe Heinich J. W. Ross R. D. Trainor W. W. Ross, Jr. Joe Ross	
62	Cora A. Shackelford	March 9, 1891	20 Years	Lead and Zinc	Delaware	Cora A. Shackelford	Clarence W. Fraser P. N. Blackstone	Muscogee, I.T.
63	Narcissa Owen	March 9, 1891	20 Years	Lead and Zinc	Delaware	Narcissa Owen	Clarence W. Turner P. N. Blackstone	Muscogee, I.T.
64	W. R. Shackelford	March 9, 1891	20 Years	Lead and Zinc	Delaware	W. R. Shackelford	Clarence W. Turner P. N. Blackstone	Muscogee, I.T.
65	Wm. O. Owen, Jr.	March 9, 1891	20 Years	Lead and Zinc	Delaware	Wm. O. Owen, Jr.	Clarence W. Turner P. N. Blackstone	Muscogee, I.T.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 41

THE CHOCTAW NATION AND THE CHICKASAW NATION, PETITIONERS

v.

STATE OF OKLAHOMA, ET AL.

No. 59

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, PETITIONER

v.

STATE OF OKLAHOMA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the court of appeals (A. 131a–146a) is reported at 402 F. 2d 739.

JURISDICTION

The judgment of the court of appeals (A. 146a) was entered on October 31, 1968. The petition for a writ of

certiorari on behalf of the Choctaw Nation and the Chickasaw Nation was filed on January 25, 1969 (No. 976, O.T., 1968). By order entered on January 9, 1969, Mr. Justice White extended the time for the Cherokee Nation or Tribe of Indians of Oklahoma to file a petition for a writ of certiorari to and including March 5, 1969, and their petition was filed on March 3, 1969 (No. 1104, O.T., 1968). The petitions in both cases were granted on April 21, 1969, and the cases consolidated. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether by treaties and patents in the 1830's, granting outright to the petitioner-tribes tracts of lands described only by metes and bounds which included a segment of the Arkansas River, the United States conveyed ownership of the riverbed, so that it could not have passed to the State of Oklahoma under the "equal footing doctrine" when that State was created in 1907.

STATEMENT

1. The tribes before the Court as petitioners in the present cases inhabited lands in the southeastern United States that early felt the pressure of migrating white settlers involved in the westward expansion of the Nation. The government's response, in order to accommodate the divergent interests of settlers and Indians, took the form of offering the Indians parcels of land further west of the immediately threatened areas in return for their peaceful removal from the lands on

which they were then living. Under this program, by a series of treaties in the early 1800's the Cherokees and the Choctaws were resettled in various locations in a generally westward course, in territory acquired by the United States in 1803 as part of the Louisiana Purchase.[1]

Finally, by the Treaty of Dancing Rabbit Creek on September 27, 1830, with the Choctaws (7 Stat. 333), and by the Treaty of New Echota on December 29, 1835, with the Cherokees (7 Stat. 478), the government promised to convey to the tribes very large tracts of land in what is today the State of Oklahoma, and patents were subsequently issued conveying these lands to them "in fee simple".[2] In the treaties and patents the lands conveyed were described only by exterior metes and bounds (see, *e.g.*, A. 8a–12a), and in the aggregate these grants included all the lands through which the navigable portion of the Arkansas River in Oklahoma runs, a portion of the river being entirely within the grant to the Cherokees, and another segment of the river being the boundary line between the two grants. Both treaties solemnly assured the Indians that these new homelands would never be made part of a State or territory.[3] Approximately sixty years later, however,

[1] These developments are summarized in the opinion of the court of appeals (A. 134a–136a).

[2] The grant to the Cherokees covered more than 14 million acres. (See A. 11a).

[3] The Choctaws were promised that "no part of the land granted them shall ever be embraced in any Territory or State" (7 Stat. 333, 334), and the Cherokees were similarly told that their new lands

intent on creating a State that would include the lands that had been granted to the Indians, Congress in 1893 established a commission to negotiate an agreement with the tribes superseding the Treaties of Dancing Rabbit Creek and New Echota, and the tribes ultimately agreed to a disposition of their affairs whereby title to tribal lands passed to the United States as trustee for the individual members of the tribes. See Act of April 26, 1906, 34 Stat. 137; *Missouri, Kansas & Texas Ry.* v. *United States*, 235 U.S. 37.[4] The next year, 1907, Oklahoma was admitted to the Union "on an equal footing with the original States". See Act of June 16, 1906, 34 Stat. 267.

2. The issue in this case, an action for an accounting brought by the Indians against the State and various oil companies holding leases from the State, is the ownership of the riverbed of the portion of the Arkansas River, below the ordinary high water mark, bracketed by the grants. With ownership of the bed, of course, goes the right to exploit the subsurface resources, including oil. Oklahoma claims the entire riverbed, arguing that the United States had reserved ownership of the bed of the river and held it in trust for the future State, and that under the "equal footing doctrine" the title to the riverbed passed to the State automatically upon its entry into the Union. The

"shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory" (7 Stat. 478, 481).

[4] This Court's opinion in *Choate* v. *Trapp*, 224 U.S. 665, 667–670, details the factors leading up to these negotiations and the agreements reached. See also A. 136a–137a.

Cherokees claim the whole of the riverbed where it is surrounded by their lands, and half of the bed—to the "thread" of the river—where the river is the boundary between their lands and those of the Choctaws and Chickasaws.[5] These latter tribes—whose grant is earlier in time—claim the entire bed of the boundary river.[6]

The court of appeals, affirming the rulings of the district court (A. 113a, 114a, 117a–120a), recognized that "patents issued to the Cherokees and to the Choctaws contained no exception or reservation relating to the beds of navigable streams. The lands granted were described by their exterior boundaries" (A. 136a). Nevertheless, notwithstanding the unqualified language of the grants and the pledge that the lands would never be included in any State, the court below concluded that, under the "equal footing doctrine" of *Pollard* v. *Hagan*, 3 How. 212, as construed in *United States* v. *Holt State Bank*, 270 U.S. 49, the lands under the Arkansas River must be deemed to have been reserved for the future State because no explicit statements were made to the contrary. The court held that the State of Oklahoma, therefore, received title to the

[5] Although the grants involved in this case were made directly to the Choctaw Nation, the Chickasaw Nation owns an undivided interest in the Choctaw lands by virtue of the Treaty of January 17, 1837, 11 Stat. 573, and the Treaty of June 22, 1855, 11 Stat. 611.

[6] We express no view on the conflicting claims of the tribes where the Arkansas River is the boundary between the grants. Because of their ruling in favor of the State, the courts below had no occasion to decide this dispute and this Court will presumably not reach the question on the present review.

bed of the Arkansas River when it entered the Union and could thus control the exploitation of subsurface mineral rights.

SUMMARY OF ARGUMENT

The plain terms of the treaties and patents involved in this case reveal an unqualified grant in fee simple of *all* land encompassed within the perimeters specified, and these conveyances naturally carried with them the ownership of the beds of navigable rivers flowing through the region. They contain no suggestion that the United States sought to reserve ownership of the riverbeds; on the contrary, where the United States wished to preserve some interests or privileges, the treaties expressly defined them. Since the treaties expressed a clear intention to convey a peaceful, secure, and permanent homeland for the Indians, there is no basis for inferring any unarticulated intention to reserve ownership of narrow strips of land in the midst of these remote tracts.

Giving these treaties and patents their natural meaning is fully consistent with the principles that new States are deemed to enter the Union on an "equal footing" with their sister-States, and that the United States normally holds navigable waterways in territories in an "implied trust" for a prospective State. The "equal footing"-"implied trust" doctrine recognizes that the national government, in the pre-statehood period, has complete authority to dispose of lands that would otherwise pass automatically to a new State, if the government considers such a course

appropriate. The grants in this case amply manifested such a decision, for they created an autonomous Indian region that was pledged never to be included within the jurisdiction of any State. At the time of the conveyances these Indians were entrusted with a measure of sovereignty analogous to what a State would have received; contemporaneous pledges that no State would ever be erected must be taken to negate any general presumption that the United States, as a matter of policy, ordinarily holds lands under navigable rivers in trust for future States.

No support for a contrary conclusion is furnished by a letter from the Interior Department written in 1908, asserting that ownership of the bed of the Arkansas River had been reserved and had passed to Oklahoma upon statehood. The letter simply quotes generalized discussions in this Court's cases but makes no effort to analyze the grants involved here to determine the effect of those principles upon the interpretation of these grants. The letter also contains several factual inaccuracies on material issues. Since it was drafted more than seventy years after these treaties and patents, the letter cannot be said to represent a "contemporaneous" executive construction. That letter, therefore, does not deserve any weight in this Court's appraisal of pertinent factors underlying a proper interpretation of the grants. On a fresh and objective analysis, the treaties and patents will be found to have conveyed ownership of the riverbeds claimed by petitioners; the contrary holding of the court of appeals was error.

357-927—69——2

ARGUMENT

THE LAND GRANTS TO PETITIONERS INCLUDED OWNERSHIP OF THE BED OF THE SEGMENT OF THE ARKANSAS RIVER ENCLOSED BY THE GRANTS, AND THE RIVERBED NEVER PASSED TO THE STATE OF OKLAHOMA

The United States government supports the position taken by the Indians in this litigation that the treaties entered into between the government and the tribes nearly a century and a half ago, as implemented by the land patents, effectively conveyed to the Indians the full and complete ownership of that portion of the bed of the Arkansas River that lies within the area encompassed by the grants. In our view the narrow construction placed upon these grants by the court below ~~deserves~~ disserves the clear intendment of what this Court has called the "solemn treaties" between the United States and these tribes. *Atlantic & Pacific R.R. Co.* v. *Mingus,* 165 U.S. 413, 437.

A. THE GRANTS ON THEIR FACE UNRESERVEDLY CONVEYED OWNERSHIP OF ALL LAND WITHIN THE SPECIFIED PERIMETERS, INCLUDING THE LAND BENEATH NAVIGABLE WATERS

The treaties and patents involved in this case conveyed huge tracts of land to the Cherokee and the Choctaw Indians, in fee simple, as their permanent homelands. The lands granted were defined simply by reference to lines marking the perimeters of the tracts conveyed; circumscribed by these boundaries was the portion of the Arkansas River flowing through the area. By ordinary rules of conveyancing, as well as the natural meaning of the language used, these grants carried with them the ownership of everything in-

cluded within their perimeters, since there was no expression of any intent to qualify or limit what on their face are outright grants of all the territory defined by the exterior metes and bounds specified.

Underscoring the breadth of the cession to the Choctaws, for example, are the provisions for complete self-government of their "country" (Arts. II, IV, 7 Stat. 333–334), and for the Choctaws to require written permits of anyone who desired to trade with members of the Nation (Art. X, 7 Stat. 335). Furthermore, the only reference in the Treaty of Dancing Rabbit Creek to "navigable streams"—apart from mention of the Arkansas River and the Red River as constituting or as intersecting the boundaries of the grant—was the assurance *to the Choctaws* that they would have free use of all such streams and be subject to no higher toll or duty than citizens of the United States (Art. XI, 7 Stat. 335). In that same article, reflecting the only express reservation of rights in the treaty, it was provided that the United States might establish any necessary post offices and military post roads and posts. There was not even a mention of the right of white men to travel along the navigable waterways within the territory ceded, much less an indication of an intention to reserve ownership of the beds of such rivers.

The structure of the Treaty of New Echota with the Cherokees was much the same. Explicitly reserved were the right to establish and maintain military posts and roads as might be necessary for the "interest and protection" of the Cherokees, along with

the right to the free use of "land, timber, fuel and materials" for the construction and support of such facilities, "provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made" (Art. 3, 7 Stat. 480–481). The Cherokees, too, were accorded rights of self-government, see *Atlantic & Pacific R.R. Co.* v. *Mingus, supra,* provided only that their laws not be inconsistent with the Constitution of the United States or with the acts of Congress "regulating trade and intercourse with the Indians", and that the Indian laws would not apply to soldiers and citizens traveling or residing, with permission, in the Indian country (Art. 5, 7 Stat. 481). Further highlighting the scope of the grant to the Cherokees is the provision that, in addition to the millions of acres conveyed to them in fee simple, the Indians were guaranteed "a perpetual outlet west, and a free and unmolested use of all of the country west of the western boundary" of the tract, "as far west as the sovereignty of the United States and their right of soil extend". But appended to this assurance, amply testifying to the ability of the draftsmen to define conditions and reservations when any were intended, was the proviso that if the "salt plain on the western prairie" fell within the limits of that outlet, "the right is reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees" (Art. 2, 7 Stat. 480).

No article in the Cherokee treaty, as none had in the treaty with the Choctaws, hinted at a reservation of ownership of the beds of the rivers flowing through

the lands ceded. Indeed, it would have been pointless for the United States to have reserved ownership of submerged land of no apparent value in the midst of a remote tract that was conveyed to the Indians precisely because it was far removed from the regions where the United States government and white settlers had substantial interests. The absence of any express clause dealing with title to the riverbed, therefore, must fairly be attributed to a desire to avoid the superfluous.

B. NOTHING IN THE "EQUAL FOOTING"-"IMPLIED TRUST" DOCTRINE UNDERMINES THE INTENT AND EFFECT OF THE GRANTS TO PETITIONERS

The only speculation thus far advanced for imputing to the treaty-makers some intention to reserve ownership of the riverbeds rests on a legal principle—the "equal footing doctrine"—that *may* inform the search for intent, but is no substitute for a factual inquiry into actual intent. The premise of the "equal footing doctrine" is that the original thirteen States assumed full ownership of the lands below navigable waterways, with the national government entrusted by the Constitution only with authority to regulate the use of navigable waters for the protection and promotion of commerce and the maintenance of national defense. When new States are admitted to the Union, according to this principle, they should be assumed (as is customarily provided in the Congressional act or resolution) to be admitted on "equal footing" with their original sister-States. A corollary of this as-

sumption is the "implied trust" concept: that land below navigable waters is held by the United States before statehood "in trust" for future States, and passes automatically to the State upon its entry into the Union. See, *e.g.*, *Mumford* v. *Wardwell*, 6 Wall. 423, 436; *Weber* v. *Board of Harbor Commissioners*, 18 Wall. 57, 65–66. These principles, however, do not properly justify the construction reached by the court below.

The "equal footing doctrine" is generally traced to the decision in *Pollard* v. *Hagan*, 3 How. 212, a decision rendered in 1845—ten years after the treaty with the Cherokees was concluded and fifteen years after the treaty with the Choctaws. Thus it is immediately doubtful that the silence of the treaty-makers on the precise question of ownership of the riverbed can fairly be interpreted as a conscious decision to reserve these lands to assure the "equal footing" of a future State. But in any event, the development of this doctrine, even after it was articulated by this Court, is completely consistent with effectuating what we believe was the clear intent to convey title of the riverbed to the Indian grantees.

The situation in *Pollard* involved a congressional attempt, *after* Alabama had entered the Union, to grant land below the high water mark of the Mobile River. In explaining why this attempt was ineffectual, some of the Court's language implied a lack of power in the federal government *ever* to convey land under a navigable river, even before statehood, on the theory that in such a circumstance the new State would not stand on an equal footing with the original States.

Those suggestions were quickly repudiated five years later in *Goodtitle* v. *Kibbe,* 9 How. 470, 478, where the Court followed the narrow holding of *Pollard* but explained: "Undoubtedly, Congress might have granted this land to the patentee * * * before Alabama became a State. But this was not done." Accord, *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, 83. This "whole subject has been clarified" (*id.* at 84) in *Shively* v. *Bowlby,* 152 U.S. 1, which contains an exhaustive history of the "equal footing"-"implied trust" doctrine, stating the course that has generally been followed by the United States as a matter of policy, while affirming its power to depart from this policy by making pre-statehood grants (152 U.S. at 48, 49–50, 58):

> By the Constitution, as is now well settled, the United States, having rightfully acquired the Territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the Territories, so long as they remain in a territorial condition. * * *
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>
> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out

other public purposes appropriate to the objects for which the United States hold the Territory.

* * * * *

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory * * * that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

* * * * *

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international

> duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

As the Court there made clear, reservation of the ownership of the beds of navigable rivers is a matter of policy judgment, subject to exception when deemed appropriate by the proper organs of the national government. The analogy of the United States as "trustee" for prospective States, therefore, is imprecise, for prior to statehood the national government remains free to dispose of such lands as it sees fit, even if the future State will thus lack complete equality with its sisters because of the conveyance. See United States Constitution, Art. IV, § 3; *Alabama* v. *Texas,* 347 U.S. 272, 273–274, and 275, 277 (Reed, J., concurring). Short of an outright grant in fee simple, the United States may also determine to hold such lands in trust for purposes other than automatic transfer to a later created State, and such a trust will effectively preclude automatic acquisition by the State under the "equal footing" doctrine. See *Knight* v. *United States Land Association,* 142 U.S. 161, 183; *Shively* v. *Bowlby, supra,* 152 U.S. at 30–31.[7]

[7] Thus, to the extent that in 1906 the tribes ceded their interest in the riverbed to the United States in trust for the members of the tribes (see p. 4, *supra*), ownership of the bed did not in any event pass to Oklahoma when it became a State in 1907.

The "equal footing"-"implied trust" doctrine, therefore, marks the beginning and not the end of the inquiry into what the national government intended to pass in a particular conveyance. But before those principles even become relevant in construing the scope of a grant, there must be some demonstrable expectation that the lands involved will ultimately form part of a State. The understanding at the time of the grant is what is pertinent for these purposes, and thus the general purpose at the time of the Louisiana Purchase to hold the territory for the creation of States is not controlling. *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* 260 U.S. at 85.

That critical premise was explicitly negated in the treaties involved here. The Cherokees and the Choctaws do not assert ownership of the bed of the Arkansas River through "piecemeal" grants to individuals of "private property" carved from land held "for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community." *Shively* v. *Bowlby, supra.* Here, an entire region was conveyed to tribes of Indians as part of their resettlement, with assurances of self-government and with the pledges that their new homelands *never would be part of any State.* As the Supreme Court of Oklahoma has observed, these treaties "in a measure departed from" the original purpose of the Louisiana Purchase to create new States. *Vickery* v. *Yahola Land & Gravel Co.,* 158 Okla. 120, 123, 12 P. 2d 881, 885. Far from permitting any inference that the United States was

implicitly reserving from otherwise unqualified grants the ownership of riverbeds which would later be transferred automatically to a State, these treaties assured the Indians a sovereign autonomy that, by necessary parity of reasoning, must be taken as passing title to the riverbeds *to them* as the authority that was constituted *in lieu of* a prospective State.

This Court has already recognized the unique character of these treaties. In *Atlantic & Pacific R.R. Co.* v. *Mingus, supra,* the Court sustained a statutory forfeiture of land previously conveyed to a railroad company on the condition that it complete a lengthy railroad within a certain period. The company defended by pointing out that the proposed route lay through the Indian country ceded to the tribes presently before the Court; that the original statutory grant had promised that Congress would procure the necessary extinguishing of Indian ownership as soon as public policy and the Indians' welfare allowed; but that Congress had failed to take any steps along those lines. In explaining why the lands held by the Choctaws and Cherokees under the Treaties of Dancing Rabbit Creek and New Echota would not be construed as falling within the statutory term "Indian territory", the Court explained [165 U.S. at 435–436]:

> * * * [A] reference to some of the treaties, under which it [the land] is held by the Indians, indicates that it stands in an entirely different relation to the United States from other Territories, and that for most purposes it is to be considered as an independent country.

Under such treaties, the Indians had been enacting and executing their own laws, appointing their own

officers, raising and expending their own revenues (165 U.S. at 436). In this context, the Court found it impossible to believe that Congress could have intended to commit itself to extinguish "a title guaranteed to the Indians by solemn treaties and which had been possessed by them [by that time] for upwards of forty years with the powers of an almost independent government" (165 U.S. at 437).[8]

In this light, we submit, wooden—and essentially retroactive—application of the supposed strictures of the "equal footing"-"implied trust" doctrine is inappropriate. To ascribe to the United States government, whose agents drafted those treaties, an unexpressed intent to reserve ownership of the bed of a river traversing autonomous Indian lands, for the benefit of a hypothetical State that the government explicitly promised would never comprehend those lands, would be to indulge a cynical fiction without any basis in fact. Such a niggardly construction is utterly devoid of suport in the circumstances surrounding the conveyance, and is on the contrary manifestly inconsistent with the bilateral understanding of the rights being created.

In concluding that it could not accord these treaties their evident scope, the court below relied heavily on the decision in *United States* v. *Holt State Bank,* 270

[8] The Treaty of New Echota with the Cherokees had declared that, "to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States," Congress might provide for them to send a delegate to the House of Representatives (Art. 7, 7 Stat. 482).

U.S. 49. In *Holt Bank* this Court had summarized the "equal footing doctrine" and its effect in these words (270 U.S. at 54–55):

> It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such land by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the States and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in virtue of its admission into the Union are restricted or qualified accordingly. * * * But, as was pointed out in *Shively* v. *Bowlby,* [152 U.S.] pp. 49, 57–58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty

> or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

The references to commerce, navigation, international duty, etc. were of course not intended to be anything more than illustrations of the purposes for which the United States government might find it appropriate in the exercise of its sovereign capacity to transfer lands under navigable waterways instead of retaining them for a future State. The court below erred in erecting what this Court provided as a generally sound guide, which may prove helpful in discerning the actual intent of a grant, into a presumption of law of nearly irrebuttable proportions. In seizing upon the phrases "in exceptional circumstances" and "unless the intention was definitely declared or otherwise made very plain" (A. 138a), the court of appeals failed to take proper account of the circumstances in which that language was used. Analysis of the context in *Holt State Bank* will demonstrate, we believe, that the principles there expressed and applied support, if indeed they do not compel, the conclusion that the treaties and patents in the present case effectively passed title to the bed of the portion of the Arkansas River flowing through the Indians' lands.

At issue in *Holt Bank* was the ownership of the bed of a lake that had been drained after Minnesota was

admitted to the Union. The Court noted (270 U.S. at 57-58):

> An affirmative disposal is not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. * * *

The Court declined to accept the contention that merely assigning the lands to an Indian reservation prevented their passage to the State under the "equal footing doctrine," because that view would have extended to all navigable waters, including the 400-square mile Red Lake and the large international Lake of the Woods. Significantly, no grant of a fee was involved, with promises of perpetual autonomy; the government there had merely established a reservation for the Indians in return for their cession of their aboriginal right of occupancy of some surrounding lands. The Court emphasized this factor (270 U.S. at 58-59):

> There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock,* 185 U.S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from

the established policy, before stated, of treating such lands as held for the benefit of the future State.[9] * * *

In *Holt Bank*, moreover, the pertinent treaties with the Indians preceded by only three years the admission of Minnesota as a State. Similarly, the grants to

---

[9] Compare *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, where an Act of Congress set apart "the body of lands known as Annette Islands" as an Indian reservation for the Metlakahtla Indians and the question was determining the perimeters of the grant. The Court began by examining the language of the statute and then stated (248 U.S. at 87):

"As an appreciation of the circumstances in which words are used usually is conducive and at times is essential to a right understanding of them, it is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created * * *." After an examination of the circumstances surrounding the legislation, the Court held that it included the lands under the adjacent navigable waters. In the present case, the problem is a simpler one, since the lands in question are within the outside limits of great unconditional land grants.

In a post-*Holt* decision, the Ninth Circuit found no inconsistency in following the *Alaska Pacific Fisheries* approach of examining the surrounding circumstances to determine the scope of the land included within an Executive Order reserving for Indians tracts of land described by government survey lot and section descriptions. *Moore* v. *United States*, 157 F. 2d 760, certiorari denied, 330 U.S. 827. The court rejected an attempt to make the "equal footing" doctrine an automatic and inflexible rule, and held instead that the reservation included adjoining underwater lots. The court explained (157 F. 2d at 765):

"* * * There [in *Holt Bank*], as in the Annette Islands case and the instant appeal, the question was one of intent. *Alaska Pacific Fisheries* v. *United States*, *supra*, is not mentioned and we cannot regard it as overruled sub silentio. * * *"

individual settlors in *Shively* v. *Bowlby, supra,* 152 U.S. at 51, were made only nine years before Oregon entered the Union. In those cases, it was reasonable to determine that Congress *had not intended* to convey away the lands that would otherwise imminently pass to the States. Here, by contrast, at the time the treaties were drawn and signed, and at the time the patents were issued, the express determination was that there would never be any State with jurisdiction over the uplands, much less potential ownership of the bed of a river running through those lands. Indeed, it was not until more than seventy years later, after the Indians had been persuaded to renegotiate their interests, that it was even found possible to create the State of Oklahoma and include the Indian lands in it.[10]

In both of those cases, too, important national and international waterways were involved: in *Shively* it was the Columbia River, and in *Holt Bank* it was Mud Lake, which was found to have been a wide portion of a river long used by settlers and traders for travel and commerce (270 U.S. at 56–57). There is no indication that at the time the United States government granted to the Choctaws and Cherokees the tracts of land surrounding a major segment of the Arkansas River, the river was an important artery of commerce. In any event, one of the principal, express purposes of the

[10] See *Choate* v. *Trapp, supra,* 224 U.S. at 667–670.

treaties was to secure for the Indians a region where they would be free from the incursions of unwelcome white men (see pp. 2–3, *supra*). Even though the Indians may not have been given complete authority to control the use of the river for commerce, there is no reason to believe the United States retained anything more than a right to regulate navigation and commerce, a function that *Pollard* v. *Hagan, supra*, established did not carry with it a reservation of ownership of the riverbed.[11] And it cannot be denied, we believe, that inclusion of the riverbeds in the grants fulfilled an appropriate public purpose; conveyance of unreserved ownership of all land embraced within the tracts represented a fair and sensible cession of what was to be a permanent, quasi-independent homeland for the Indians, exchanged for their removal from lands the white settlers sought to claim.

We therefore submit that, construing the treaties and patents with the aid of all available indicia of their meaning, and not simply according to a single subsequently developed maxim of interpretation, the grants of land to the Cherokees and Choctaws sufficiently manifested the national government's intent to include in its cession the ownership of the bed of the river flowing through the Indians' new homelands.

[11] Although the treaties adverted to congressional regulation of commerce with the Indians and travel through their territory by white citizens, permission from the tribes was apparently contemplated as a pre-condition to such travel or residence in the area by non-Indians. See, *e.g.*, Arts. 5 and 6, Treaty of New Echota, 7 Stat. 481.

There is no warrant for imputing to the government an intention to retain the ownership of isolated strips of land beneath the Arkansas River to be held in trust for a hypothetical State that at the time the parties solemnly declared would never come into existence.

C. A CONTRARY CONCLUSION REACHED BY THE DEPARTMENT OF THE INTERIOR IN 1908 WOULD NOT JUSTIFY REJECTION OF PETITIONERS' CLAIMS

In the case of *State* v. *Nolegs*, 40 Okla. 479, 484–485, 139 Pac. 943, 945, where the issue was the navigability of a particular portion of the Arkansas River, the Supreme Court of Oklahoma cited, as one item of evidence establishing navigability, a letter from the Department of the Interior which embodied that conclusion.[12] That letter (which we have reproduced in

[12] *Nolegs* was an action by the State of Oklahoma against riparian owners who had purported to lease mineral rights in the bed of the Arkansas River. The court did not discuss the "equal footing"-"implied trust" doctrine, but concluded that, because it found the river to be navigable, ownership of the bed had passed to the State upon its entry into the Union. The only Indian property-owner in the case, an Osage, was dismissed as a party because of the absence of the United States, from whom he claimed. The court had no occasion to discuss the significance of the treaties and patents involved in the present case.

In *Vickery* v. *Yahola Sand & Gravel Co.*, 158 Okla. 120, 12 P. 2d 881, the Oklahoma court held that a Cherokee allottee had no claim for minerals taken out of the bed of the Arkansas River. Because in its view the United States would have had no proper purpose in conveying ownership of the riverbed to the Cherokees, the court determined that these lands had been reserved in trust for the State of Oklahoma and had passed to it. We submit that the court's analysis pays insufficient attention to

full as an Appendix to this brief) was prepared by the Acting Commissioner of Indian Affairs and authorized by the Secretary of the Interior as a response to a request for instructions from the Commissioner to the Five Civilized Tribes (which included the Cherokees and the Choctaws). He had apparently been approached by a sand and gravel company to obtain approval of its view that it need not pay royalties to the Cherokee Nation for minerals extracted from the bed of the Arkansas River after Oklahoma's admission to the Union because, at that time, "the title to the bed of the river had passed from the Cherokee Nation to the State of Oklahoma" (App., *infra,* p. 30). The letter proceeds to quote extensively from several of this Court's decisions, and concludes that the United States had reserved ownership of the riverbed until it passed automatically to Oklahoma upon statehood (App., *infra,* p. 34). In opposing certiorari, respondents contended that this letter is of "extreme importance" in showing a "long continued executive interpretation expressly placed upon the treaties involved in this litigation by the Department of the Interior, which is charged with their administration" (Brief in Opp., p. 16, Nos. 976 and 1104, O.T. 1968). This reliance is wholly misplaced.

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the variety of purposes which might have prompted the national government to have made such a grant and fails to confront satisfactorily the purpose and breadth of the treaties and patents at issue. See, also, *Lynch* v. *Clements*, 263 P. 2d 153 (Okla.). The question is, of course, as no one disputes, solely a matter of federal law.

Contrary to respondents' statements, and highlighting the principal deficiency of the letter, it featured absolutely no discussion of the treaties which are at the core of this lawsuit. The letter simply quoted from this Court's cases dealing in general terms with the "equal footing"-"implied trust doctrine"—cases which expressly recognized that the government had power in appropriate circumstances to convey riverbed lands (see App., *infra*, p. 33)—and mechanically assumed the answer to the very question at issue. The circumstances surrounding these treaties were not discussed, nor was the possible significance of the language defining the conveyance only by exterior metes and bounds.

The factual errors in the only sentence relevant to the issue further demonstrate the lack of attention given at the time to the real problem.[13] The letter states (App., *infra*, p. 34):

> In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the ownership of the beds of navigable streams but reserved them for the benefit of the future State within whose boundaries they would fall.

But the United States did not convey these tracts by warranty deed; it was the treaties and the patents pursuant thereto which accomplished the transfer of title. Those conveyances were not of lands occupied

[13] The letter was written at a time when allotment of the lands, with a view to liquidation of the tribes, was in active process. See *Federal Indian Law* (Dept. of the Interior), pp. 994 *et seq.*

by the Indian tribes; instead, they were of vacant lands given in return for cession of lands east of the Mississippi occupied by the tribes. There was no desire to retain the riverbeds for a future State within whose boundaries they would fall; the treaties expressly disclaimed the intention to create a State. These significant factual errors and omissions demonstrate why the conclusion reached, unaided by any explicit analysis or reasoning, deserves no weight in this Court's consideration of the issue.[14]

In addition, we note, there is no indication that the Indians affected were consulted on the question. And, since the letter post-dates the treaties and patents which are the focus of this case by more than seventy years, the conclusion reached can scarcely be termed the sort of "contemporaneous" administrative construction that may helpfully enlighten judicial interpretation of legal documents.

This Court is therefore entitled to approach these important questions afresh. For the reasons stated above, we believe that consideration of the terms of the Treaty of Dancing Rabbit Creek and the Treaty of New Echota, in light of their peculiar historical context, will show that the United States government did exercise the power confirmed by this Court's decisions to convey to the Cherokees and to the Choctaws the ownership of the bed of the Arkansas River where it flows through the lands granted to them.

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[14] The United States, this Court has held, cannot be estopped to disavow the errors of its subordinate officers. *E.g.*, *United States* v. *California*, 332 U.S. 19, 39–40.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed, and the cause remanded for further proceedings.

Respectfully submitted.

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JULY 1969.

APPENDIX

Department of the Interior, Office of Indian Affairs
WASHINGTON, *Mar. 26, 1908.*

Subject:
Purchase of sand and gravel by Lowerree Rucker Company from bed of Arkansas River

The Honorable, The Secretary of the Interior.

Sir: I have the honor to invite your attention to the enclosed letter of March 2 from J. G. Wright, Commissioner to the Five Civilized Tribes, submitting communication of February 13 from the United States Indian Agent, Union Agency, relative to an application made on August 30, 1907, by the Lowerree Rucker Company for permission to enter into a contract for the taking of sand and gravel from the Arkansas River within the limits of the Cherokee Nation. Mr. Wright quotes the Agent as reporting that a representative of the Lowerree Rucker Company called at his office and said that practically no gravel had been taken out of the river prior to November 16, 1907, the date when the Indian Territory became incorporated as a part of the State of Oklahoma; that it was the contention of the company that the title to the bed of the river had passed from the Cherokee Nation to the State of Oklahoma; and that for that reason the company did not think it proper to enter into a contract to pay royalties to the Cherokee Nation for gravel taken from a river situated in the State of Oklahoma.

The Commissioner says that there are in existence other contracts for the taking of sand and gravel from the Arkansas River, which the War Department has held to be a navigable stream, and that all the parties to such contracts are contending that from and after November 16, 1907, when Indian Territory became a part of the State of Oklahoma, neither the Cherokee Nation nor the Department of the Interior had further jurisdiction in the matter, and that they should no longer be required to pay royalty on sand and gravel taken from the bed of any navigable stream. Commissioner Wright asks for instructions.

In the case of Shively vs. Bowlby (152 U.S. 1) the Supreme Court very thoroughly discusses the question of riparian rights and quotes from certain of its previous decisions from which the following is cited:

In the case of Weber v. Harbor Commissioners (18 Wall. 65, 66), involving the question of ownership of lands below tide-water at San Francisco:

> Although the title to the soil under the tide waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government.

The case of Knight v. United States Land Association (142 U.S. 183):

> It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States; and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf, as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico, the United States acquired the title to tide lands, equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory.

In St. Clair v. Lovingston (34 Wall. 64, 68):

> By the American Revolution, the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.

In summing up the case before it the court said:

> Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Consitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high water mark, therefore, are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution.

The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international

duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

The Arkansas River throughout its length in the Cherokee Nation is a navigable stream under the laws of the United States.

Under the above-quoted holding of the Court, it must be conceded that when the State of Oklahoma was created, its jurisdiction and ownership of the lands below high water mark of all navigable streams within its boundaries, became absolute. In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, it did not convey the ownership of the beds of navigable streams but reserved them for the benefit of the future State within whose boundaries they would fall. Thus, the State of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas River, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 16, 1907.

Very respectfully,

s/C. F. LARRABEE,
Acting Commissioner.

Approved:

s/JESSE E. WILSON,
Secretary.

MARCH 27, 1908.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

Nos. 41 and 59

THE CHOCTAW NATION AND THE CHICKASAW NATION,
Petitioners,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

CONSOLIDATED BRIEF FOR RESPONDENTS ANSWERING THE BRIEF OF THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, AND THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS, PETITIONERS, AND THE BRIEF FOR THE UNITED STATES, AS AMICUS CURIAE

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In the
Supreme Court of the United States
OCTOBER TERM, 1969

Nos. 41 and 59

THE CHOCTAW NATION AND THE CHICKASAW NATION,
Petitioners,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,

VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

CONSOLIDATED BRIEF FOR RESPONDENTS ANSWERING THE BRIEF OF THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA, AND THE BRIEF OF THE CHOCTAW AND CHICKASAW NATIONS, PETITIONERS, AND THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 402 F.2d 739. A copy of the orders of the District Court for the Eastern District of Oklahoma and of its judgment are included in the Joint Appendix at pages 107a-116a inclusive, pages 117a and 118a, pages 119a and 120a, and at page 126a.

JURISDICTION

The jurisdictional requisites are set forth adequately in the briefs of Petitioners.

CONSOLIDATION OF BRIEF

This was one case in the District Court and was treated as one case in the Court of Appeals, and was consolidated by Order of this Court April 21, 1969. Respondents file a consolidated brief answering the brief of The Cherokee Nation or Tribe of Indians in Oklahoma (designated hereinafter sometimes as "the Cherokees"), answering the brief of The Choctaw and Chickasaw Nations (designated hereinafter sometimes as "the Choctaws"), both of said petitioning parties also being designated hereinafter sometimes as "Petitioners," and answering the brief for the United States as *Amicus Curiae*. The purpose of consolidation is to avoid needless repetition, for though the Cherokee claims and the Choctaw claims are based on different treaties and patents, the legal principles in the interpretation thereof are the same.

The length of this brief is due to the necessity of answering several briefs and to the omission of important information from the briefs filed by Petitioners.

QUESTION PRESENTED

Respondents controvert the statement of the "Questions Presented" in the Brief of the Cherokees and the statement of the "Questions Presented for Review" in the Brief of the Choctaws, and the statement of the "Question Presented" in the Brief for the United States as *Amicus*

Curiae, on the ground that each of those statements ignores the real question which Respondents submit is this:

> In the treaties with the Cherokees and the Choctaws, and in the patents authorized by the treaties, did the United States definitely and plainly express an intention to convey the river bed of the navigable Arkansas River in Oklahoma below its confluence with the Grand River?

STATEMENT OF THE CASE

This is an action to quiet title and for an accounting. It was filed in December, 1966 by the Cherokees against Respondents. The Choctaws intervened. No suit involving this subject matter had been filed before that time by either. The Cherokees and the Choctaws asserted conflicting claims. Respondents, the State of Oklahoma and its lessees, filed answers and cross-petitions to quiet title against the Cherokees and the Choctaws.

The subject matter of the litigation is certain land in Oklahoma consisting of the bed of the Arkansas River from its confluence with the Grand River to the Oklahoma-Arkansas state line. The navigability of this stretch of the river was not disputed in the Court of Appeals.

The Cherokees claim under certain treaties with the United States contained in the Statutes at Large and under a patent. The Choctaws also claim under certain treaties with the United States contained in the Statutes at Large and under a patent.

Oklahoma claims the bed of this navigable stream by virtue of its sovereignty and admission to the Union on an

equal footing with the original states, there having been no prior disposal of this navigable stream by the United States, and has asserted its ownership actively since statehood on November 16, 1907.

The District Court and the Court of Appeals construed the treaties and patents and held that they did not provide for conveyance of the river bed to either of Petitioners and that title is vested in the State. In view of this holding, there was no necessity for either court to express any opinion on the conflicting claims of Petitioners.

ARGUMENT

SUMMARY OF ARGUMENT

1. Oklahoma acquired title to the river bed of the navigable portion of the Arkansas River upon being admitted to the Union in 1907. Prior to that time the United States had not conveyed the river bed to the Cherokees or the Choctaws. This part of the river was frequently used as a highway of commerce, at least, as early as 1824. See pre-trial order filed September 25, 1967—Joint Appendix, page 113a. Oklahoma is a part of the territory acquired by the United States from France through the treaty of April 30, 1803, known as the Louisiana Purchase. In Oklahoma the State owns the bed of navigable streams to the ordinary highwater mark. *City of Tulsa* v. *Commissioners of Land Office, et al.*, 101 P.2d 246 (Okla. 1940); *Lynch* v. *Clements*, 263 P.2d 153 (Okla. 1953). Oklahoma was admitted to the Union on an equal footing with the original States (34 Stat. L. 267-278). In *Pollard* v. *Hagan, et al.*, 3 How. 212, 11 L.Ed. 565 (1845), the Court cited *Martin*,

et al. v. *Waddell*, 16 Pet. 367, 10 L.Ed. 997, for the proposition that upon the Revolution the people of each State acquired absolute right to all their navigable waters and the soils under them for their common use; and the Court in *Pollard* held that the beds of navigable waters were not granted by the Constitution to the United States but were reserved by the original States and that new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. In *Shively* v. *Bowlby*, 151 U.S. 1, 38 L.Ed. 331 (1893), this Court recognized the power of Congress to grant lands below navigable waters in a territory only when it is necessary "to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce * * * or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." The Supreme Court of Oklahoma in *Vickery* v. *Yahola Sand and Gravel Co.*, 12 P.2d 881 (1932), a case based on assertion of title to the Arkansas river bed by a Cherokee allottee holding a riparian allotment, considered both the pertinent Cherokee treaties, and *Shively* v. *Bowlby*, and held the river bed was owned by the State. The decision in *United States* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465 (1925), under a fact situation similar to our case, recognizes the rule cited in *Shively* v. *Bowlby* and adds that the United States has refrained from making such dispositions of lands below navigable water during the territorial period except "in exceptional circumstances" and that disposals during the territorial period "are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." Not un-

der the standards set forth in *Holt State Bank*, nor under the general rule applicable to riparian lands along navigable waters, nor even under the general rules of ordinary conveyancing, was any grant of the river bed ever made by the United States to either the Cherokees or the Choctaws.

2. The treaties with the Choctaws culminating in the Treaty of Dancing Rabbit Creek in 1830 and the treaties with the Cherokees culminating in the Treaty of New Echota in 1835 and the respective patents thereafter issued to each of the tribes, provided only for the granting of a specified quantity of land located in a general area in the case of the Cherokees, and an unspecified quantity of land located within named boundaries in the case of the Choctaws. Fee simple title was not granted to either the Cherokees or the Choctaws. The grants to both tribes were conditional. In the Cherokee patent it is provided that "The lands hereby granted shall revert to the United States if the Cherokee Nation ceases and abandons the same." The Choctaw patent provides that it shall "inure to them as long as they shall exist as a nation and live on it." There is no language whatsoever in the treaties or patents with either of the tribes that expresses an intention to convey the title to the river bed. The Arkansas River is mentioned in these documents only as a boundary, a monument, or a reference point. All references to the river fall far short of evidencing a definite and specific intention to convey the bed of the river.

3. At the time of the treaties at issue in this case, there were specific and compelling reasons for retention by the United States of title to the navigable portion of the

Arkansas river bed, quite apart from and in addition to policies common to all navigable rivers. The acquisition of the Arkansas, a principal tributary of the Mississippi, and its retention as a national, public highway had been one of the principal expressed goals of the Louisiana Purchase, barely twenty-five years earlier. It was a critical avenue for trade, commerce, and communications not only to, but also through the treaty lands of these Indians to lands occupied by other resettled tribes and beyond, to territory from which many other States would later be carved. The bed of the Arkansas was then thought, too, to contain large deposits of valuable minerals, including salt, silver and gold. Finally, the Arkansas constituted the boundary between the Cherokee and Choctaw lands, a boundary upon which the United States was charged with both the maintenance of the peace and the regulation of commerce; and the river served as the principal lifeline of Fort Gibson, the United States' major military garrison in Indian territory. In the total absence of any demand by the Indians for the Arkansas River, it is inconceivable that the United States would have voluntarily divested itself of this critical national asset.

4. Counsel for the Cherokees and Choctaws argue that a conveyance of the river bed must be inferred from the fact that provisions were made in their respective treaties that the lands conveyed to them should not be included in the boundaries of a future Territory or State without their consent. This inference is not sufficient to effect a conveyance of the river bed under the rules we have stated above. But assuming, arguendo, that the provisions in the treaties concerning a future Territory or State may be relevant,

the significance of the provisions, their contemporaneous setting, and the events that followed must then be considered. The provisions were not inconsistent with the policies, powers and rights of the United States to form a State from an area which included the lands ceded to Petitioners. At the time of the treaties the Cherokees and Choctaws were in a state of pupilage and their relation to the United States was that of wards to their guardian. They were not foreign sovereign nations and were subject to the dominion of the United States. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L.Ed. 25. The United States intended eventually to include the area ceded to its wards in a future Territory or State. See House Report 736 dated June 27, 1848, attached as our Appendix 8 for an historical summary and discussion on this subject. See also Chapter 2 Mills' Indian Land Laws attached as our Appendix 10. Consent is required of the residents (whether Indian or White) of any area that is admitted as a State. The United States Constitution, Article IV, Sec. 3, Clause 1, provides that new States may be *admitted* into the Union by Congress. The Cherokees and Choctaws were aware of these policies, powers and rights when they made the treaties.

By the Act of March 3, 1893, 27 Stat. L. 645, Congress created a commission for the purpose of inducing the Cherokees and Choctaws and other tribes to relinquish tribal rights and to accept allotment of their lands in severalty to tribal members with the ultimate object of including said lands in a state. "Oklahoma Indian Land Titles" by W. F. Semple, Chap. II. The result of this act and ensuing acts of Congress were agreements with the Cherokees, 32 Stat. L. 716, and with the Choctaws, 30 Stat. L. 495 and

32 Stat. L. 641, which provided for allotment of the lands to individual members of the respective tribes and relinquishment of the general powers of the tribal governments. These agreements were followed by the Act of April 28, 1904, 33 Stat. L. 573, which supplanted the tribal laws; and the Act of April 26, 1906, 34 Stat. L. 137, continuing tribal governments for limited purposes pending termination at some future time, and for regulation of tribal affairs under the Interior Department. The Cherokees and Choctaws became citizens of the United States as a result of these Congressional Acts. As citizens of the Territory they voted with other citizens in the elections concerned with admission of Oklahoma to the Union—and Oklahoma was admitted on November 16, 1907.

PRELIMINARY STATEMENT

The question to be resolved is simple and direct. Did the United States convey or agree to convey the river bed to the Cherokees or the Choctaws? The answer is—No! Not by the standards this Court has established for the beds of navigable waters, nor even by the accepted standards of ordinary conveyancing. In the judgment of the courts below there was no ambiguity on this subject and each of them concluded that the treaties and patents did not provide for a conveyance of the bed of the river.

Petitioners, not having met the burden of showing inclusion of the river bed under their treaties or patents, have sought to shift the burden by arguing that the State must show that the United States *reserved* the river bed when it made the treaties and patents. *Since the United*

States did not convey the river bed there was no need to reserve it.

To avoid the stark criterion which we have stated above, Petitioners have presented a voluminous and irrelevant mass of data which should not becloud the only question that need concern this Court: Did the United States agree to convey or convey the river bed?

The premise upon which Petitioners build their argument is the fact that there are provisions in the treaties to the effect that the lands ceded to them would not, without their consent, be included within the limits of any Territory or State. From this premise they conclude erroneously that:

1. The United States forever renounced the possibility of forming a Territory or State that embraced their lands—even with their consent; and

2. The United States could not continue to hold the bed of the navigable river, after the treaties.

Each of these conclusions is a fallacy.

In Section I of our Argument we will demonstrate the basis of Oklahoma's title to the navigable river bed.

In Section II we will demonstrate that in the treaties and patents and attendant circumstances there is no evidence of an intention to convey the bed of the navigable river to either of Petitioners.

In Section III we will demonstrate that at the time of the treaties there were specific and compelling reasons for retention by the United States of title to the navigable portion of the Arkansas River bed, apart from policies common to all navigable waters.

In Section IV we will demonstrate that the provisions in the treaties that the lands ceded to each of Petitioners would not, without their consent, be included within the limits of any Territory or State, were not inconsistent with the policies, powers and rights of the United States to form a State from an area which included the lands ceded to Petitioners.

I

THE STATE OF OKLAHOMA ACQUIRED TITLE TO THE BED OF THE NAVIGABLE PORTIONS OF THE ARKANSAS RIVER WHEN IT BECAME A STATE.

The title of the State of Oklahoma basically rests upon the legally navigable character of the river bed of the Arkansas River in Oklahoma below the confluence of that river with the Grand River. Though the legal navigability of this river over this area is not questioned by Petitioners, we believe it helpful to quote the conclusion of the Trial Court on this subject:

> "It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year. Accordingly, it is the decision of this court, based upon judicial knowledge

alone and without taking evidence, that this stretch of the Arkansas River was navigable in fact and in law at the time the western domains, now a part of Oklahoma, were ceded to the Choctaw Nation and to the Cherokee Nation, and at the time the treaties were made pursuant to which the lands were ceded, and also at the time Oklahoma was admitted to statehood on November 16, 1907." (Pre-Trial Order filed September 25, 1967) (Joint Appendix 113a).

This Court judicially knows Oklahoma is a part of the territory acquired by the United States from France in what was known as "The Louisiana Purchase." This was effected by the Treaty of April 30, 1803. Particularly pertinent articles of this treaty are as follows:

"ARTICLE I. Whereas, by the article the third of the treaty concluded at St. Ildelfonso, the 9th Vendemiaire, an. 9 (1st October, 1800) between the First Consul of the French Republic and his Catholic Majesty, it was agreed as follows:

'His Catholic Majesty promises and engages on his part, to cede to the French Republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other states.'

And whereas, in pursuance of the treaty, and particularly of the third article, the French Republic has an incontestible title to the domain and to the possession of said territory: The first Consul of the French Republic desiring to give to the United States a strong

proof of his friendship, doth hereby cede to the said United States, in the name of the French Republic, forever and in full sovereignty, the said territory with all its rights and appurtenances, as fully and in the same manner as they have been acquired by the French Republic, in virtue of the above-mentioned treaty, concluded with his Catholic Majesty:

* * * * * * *

"ARTICLE III. *The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States;* and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess." (Emphasis ours.)

This Treaty and the two complementary Conventions of the same date are found in 8 Stat. L., pages 200 to 212, inclusive.

On August 12, 1803, President Thomas Jefferson wrote a letter to John Breckenridge concerning the Louisiana Purchase Treaty. Mr. Breckenridge was a Senator from Kentucky and was well-known nationally as a spokesman for the West. Later, he became Attorney General under Jefferson. In this letter President Jefferson discussed the future use to be made of the land acquired under the treaty and expressed his ideas as to the formation of future states west of the Mississippi. He said:

"* * * The inhabited part of Louisiana, from Point Coupee to the sea, will of course be immediately a territorial government, and soon a State. But above that, the best use we can make of the country for some time, will be to give establishments in it to the Indians

> on the east side of the Mississippi, in exchange for their present country, and open land offices in the last, and thus make this acquisition the means of filling up the eastern side, instead of drawing off its population. When we shall be full on this side, *we may lay off a range of States on the western bank from the head to the mouth, and so, range after range, advancing compactly as we multiply.*" (Emphasis ours.) (State Papers and Correspondence bearing upon the Purchase of the Territory of Louisiana. Washington Government Printing Office, 1903, page 235.) (A complete copy of this letter as it appears on pages 233 to 235 of this publication is included in our Appendix 10.)

Thus, we see that while President Jefferson did think that the Indians could be moved west of the Mississippi, he did not consider this to be a bar to the formation of future states in the same area which he suggested could be established "range after range, advancing compactly as we multiply."

President Jefferson, on the day he submitted the Treaty of April 30, 1803, to the Senate for ratification (on October 17, 1803), in his third annual message to Congress, had this comment to make concerning this new acquisition:

> "Whilst the property and sovereignty of the Mississippi and its waters secure an independent outlet for the produce of the Western States and an uncontrolled navigation through their whole course, free from collision with other powers and the dangers to our peace from that source, the fertility of the country, its climate and extent, promise in due season important aids to our Treasury, an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws." (Messages and Papers of the Presidents, Vol. 1, at page 346).

Claude G. Bowers, in his book "Jefferson in Power" discusses the debates in Congress concerning approval of the treaty by the Senate and appropriation of the purchase price by the House. He states that the New England Federalists bitterly opposed the treaty and the expenditure, and in discussing the grounds for their opposition he said (on page 213):

> "Many complained bitterly of paying fifteen million dollars for the territory from which were to be carved Louisiana, Arkansas, Missouri, Oklahoma, Kansas, Nebraska, the two Dakotas, the greater part of Idaho and Montana, and parts of Texas, New Mexico, Colorado, and Wyoming. An outrageous price! Rufus King, in his loftiest mood, was sure that with his diplomacy it could have been had for much less. They all agreed it was unconstitutional. But deep down, the resentment of the extreme New England Federalists was that, with the States ultimately to be carved from the new territory, the dominance of their section would be lost."

The series of Congressional Acts which followed the Louisiana Purchase and related to the establishment of the territories of Orleans and Louisiana show the determination of Congress that all navigable waters in the territories (which include what is now Oklahoma)[1] were to be held in

---

[1]After considerable debate, Congress finally voted the funds requested by Jefferson for the Louisiana Purchase. Thereafter, Congress enacted the Act of March 26, 1804, 2 Stat. L. 283, which divided the Louisiana Purchase into two territories and provided for the temporary government thereof. The Preamble of this Act is set forth below:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that portion of country ceded by France to the United States, under the name of Louisiana, which lies south of the Mississippi territory, and of an east and west line to commence on the Mississippi river, at the thirty-

trust for the citizens of the future States. Section 12 of the Act of February 15, 1811, 2 Stat. L. 617, an Act providing for the final adjustment of claims to lands and for the sale of public lands in territories of Orleans and Louisiana provides:

> ". . . and be it further enacted that *all the navigable rivers and waters in the Territories of Orleans and Louisiana shall be, and forever remain public highways.*" (Emphasis ours.)

Section 3 of the Act of February 20, 1811, 2 Stat. L. 641, an Act to enable the people of the Territory of Orleans to form a constitution and state government and for the admission of such state into the Union *on an equal footing with the original states,* and for other purposes, provides in part:

> "and that the *river Mississippi and the navigable rivers and waters leading into the same or into the gulf of Mexico, shall be common highways* and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by said state." (Emphasis ours.)

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[1] (Continued)

third degree of north latitude, and to extend west to the western boundary of the said cession, shall constitute a territory of the United States, under the name of the territory of Orleans; the government whereof shall be organized and administered as follows:

* * * * * * * *

"Section 12. The residue of the province of Louisiana, ceded to the United States, shall be called the district of Louisiana, the government whereof shall be organized and administered as follows:"

The next year Congress enacted the Act of March 3, 1805, 2 Stat. L. 331, which changed the district of Louisiana to the territory of Louisiana, which territory included all of the lands in the Louisiana Purchase except the territory of Orleans which was to become the State of Louisiana.

Section 12 of the Act of March 3, 1811, 2 Stat. L. 662, also provides:

> "That all the navigable rivers and waters in the territories of Orleans and Louisiana shall be and forever remain public highways."

The Act of Congress of June 16, 1906, known as "The Enabling Act" provided for admission of Oklahoma Territory and Indian Territory to the Union as one State, 34 Stat. L., pages 267-278. This Act is found in Oklahoma Statutes Annotated in the volume on the Constitution, Articles 1 to 4 and covering the Organic Acts. In Section 4 of the Enabling Act at page 367 of the said O.S.A. volume we find the following:

> *"the proposed State of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this Act, on an equal footing with the original States."* (Emphasis ours.)

In Section 1 of Article 11 of the Constitution of Oklahoma, the State accepts all grants of land made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which they are granted or donated. Oklahoma statutory assertions of title to river beds are as follows:

> "64 O.S.A. Section 290. LEASE OF LANDS ALONG CERTAIN STREAMS — STREAMS DECLARED PROPERTY OF STATE.
>
> "The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma." (Laws 1919, Ch. 206, p. 293, Sec. 1)

"60 O.S.A. Section 337. ISLANDS IN NAVIGABLE STREAMS.

"Islands and accumulations of land formed in the beds of streams which are navigable, belong to the State, if there is no title or prescription to the contrary." (Comp. Laws 1909, Sec. 7371).

There can be no doubt where the State of Oklahoma stands on the question involved in this case in view of the above quoted statutes and the decisions of the Oklahoma Supreme Court, and the administrative actions of the state government. In the case of *City of Tulsa* v. *Commissioners of Land Office, et al.*, 101 P.2d 246 (1940), the Oklahoma Supreme Court said:

> "In some jurisdictions the state owns the bed of navigable streams to the ordinary high water mark. In other states ownership in the state extends only to low water mark. 45 C.J. 540, 541. In Oklahoma ownership of the bed of navigable streams in the state extends to high water mark. *Nolegs* v. *Edmiston, supra*" (1914).

In the case of *Lynch* v. *Clements*, 263 P.2d 153 (1953), the Supreme Court of Oklahoma said:

> "[3]Near the land in the instant case was land involved in the case of *Vickery* v. *Yahola Sand & Gravel Co.*, 158 Okl. 120, 12 P.2d 881. The plaintiffs there admitted that the Arkansas River was navigable adjacent to the land involved. The question naturally arose as to what title, if any, the Cherokee allottee got in the river bed opposite the land in the *Vickery* case. There it was announced in the third, fourth, fifth and sixth syllabi:
>
> 'The treaties between the United States and the Cherokee Indian Tribe and the patent made pursuant

thereto, whereby certain lands on both banks of the Arkansas River in what is now the state of Oklahoma were granted to said Cherokee Indian Tribe, show no purpose to define riparian rights, and the intention to abide by state law is inferred.

'A state takes title to the bed of navigable streams in its borders, where the United States has not exercised its power so to do, by specific grant or necessary intendment, granted or conveyed its title thereto prior to the admission of the state into the Union.

'The United States did not, by specific grant, or otherwise, grant or convey to the Cherokee Indian Tribe the title to the bed of the Arkansas river, where in its course it was navigable in fact.

'A Cherokee allottee of land along the course of the Arkansas river at a place where the same is admitted to be navigable acquired no title to the bed of said river below high-water mark.' "

The State has asserted ownership of the mineral resources in the river bed over sixty years through extraction of untold tons of sand and gravel through its permittees and lessees and through the granting of oil and gas leases.

The Interior Department concurred in Oklahoma's assertion of title. In a letter dated March 26, 1908 (See *State v. Nolegs*, 139 Pac. 943 at 945), from Acting Commissioner of Indian Affairs, C. F. Larrabee, to the Secretary of the Interior, we find the following statement:

"In other words, when the United States conveyed by warranty deed the lands occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, it did not convey the ownership of the beds of navigable streams, but reserved them for the benefit of the future state within whose boundaries they would fall.

Thus the state of Oklahoma, on its creation, became absolute owner of the bed of the Arkansas river, and the Cherokee Nation is not entitled to royalty for any sand or gravel taken from the bed of that river since November 6, 1907.

"Very respectfully, (Signed) C. F. Larrabee, Acting Commissioner.

'March 27, 1908

'Approved: (Signed) Jesse E. Wilson, Secretary'" (A complete copy of this well considered opinion by Mr. Larrabee is included in our Appendix 2.)

The foregoing letter is of extreme importance here as direct evidence of long continued executive interpretation expressly placed upon the treaties involved in this litigation by the Department of the Interior, which is charged with their administration. Such long continued administrative construction has been held to have the effect of law. *Helvering* v. *Winmill*, 305 U.S. 79, 83 L.Ed. 52 (1938). It is always entitled to great weight by the courts faced with the task of construing the same treaties (statutes) and should not be overturned without cogent reasons. *Zemel* v. *Rusk*, 381 U.S. 1, 14 L.Ed.2d 179 (1965). See also the many authorities collected in 82 C.J.S. "Statutes," Sec. 359. This is especially true where such construction has been made by the highest officers in the executive department concerned, *Petition of Finance Committee of Legislature of Virgin Islands*, 242 F.2d 902 (C.A. Virgin Is. 1957), and here note that the foregoing letter was expressly approved by the Secretary of the Interior on March 27, 1908.

The presence of the oil and sand and gravel lessees of the State as defendants and Respondents in this case is a further evidence of the assertion by Oklahoma of its title

to the bed of the river between its confluence with the Grand and the Arkansas state line. Neither the United States nor the Cherokees nor the Choctaws have sought legal redress prior to the filing of this action in 1966. In the brief for the United States as *Amicus Curiae* we find an attempt to diminish the effect of this administrative interpretation letter that has stood unchallenged for sixty years by Petitioners and by the United States Department of Justice. Counsel say this interpretation should not be considered because of (1) an error of fact in that a patent was called a warranty deed, and (2) this interpretation was not made in an adversary proceeding, and (3) the letter featured no discussion of the treaties, and (4) the letter was not contemporaneous with the treaties and patents. We submit that each of these purported distinctions have no bearing on the legal effect of this administrative interpretation that was made by the Secretary of the Interior and stood unchallenged by Petitioners and *Amicus Curiae* for about sixty years.

At page 37 of the Cherokees' brief is a statement "Long before the admission of Oklahoma into the Union, the Cherokee Nation worked the river for sand and gravel and negotiated sand and gravel leases with many companies and received royalties for such minerals." In support of this statement their Appendix I is submitted. All leases listed on Appendix I are shown to be dated between 1884 and 1893 and *an examination of the records cited shows that not a single one applies to the bed of the navigable portion of the Arkansas River.*

The title of the people of the State in which the land is located to the bottoms of the navigable waters was de-

cided at an early date by the United States Supreme Court in the case of *Martin* v. *The Lessee of Waddell*, 16 Pet. 367, 10 L.Ed. 997 (1842). This case was instituted in the trial court in 1835 and decided by the United States Supreme Court in 1842. The case involved a contest for certain navigable water bottoms in New Jersey. One party claimed under a title originating in a grant from the King of England, and the other party claimed under a law of the State of New Jersey passed in 1824 and a supplement thereto. In holding for the party claiming under the State the Court related the State's title back to the time of the Revolution and it said:

> ". . . For when the Revolution took place the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government . . ."

Oklahoma was admitted to the Union "on an equal footing with the original states." Upon acquisition of the land covered by the Louisiana Purchase, the United States then held it in trust as to the navigable river beds for the states thereafter to be created from the lands thus acquired. The United States continued to hold the land under the navigable portions of the Arkansas River in trust for Oklahoma until it was created. Promptly upon achieving statehood, Oklahoma became vested with the title of the river bed of the Arkansas River under its navigable portions located below high-water mark.

A leading authority on this proposition is the case of *Pollard, et al.*, v. *Hagan, et al.*, 3 How. 212, 11 L.Ed. 565

(1845). That was a case where a claimant under a Spanish grant of land under navigable waters in Alabama sought to establish title against one claiming under the state, relying upon a confirmation of the invalid Spanish grant by the United States through a United States Statute enacted after Alabama became a State and a patent from the United States. This confirmation of title by Federal statute and patent was held to be ineffective against one claiming under the sovereign title of the State of Alabama. The Court in its opinion said:

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territoy within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin, et al.* v. *Waddell* (16 Peters, 410), the present Chief Justice, in delivering the opinion of the court, said: 'When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

". . . we have arrived at these general conclusions: First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively. Second, The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. Third, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The United States Supreme Court in the case of *Goodtitle* v. *Kibbe*, 9 How. 471, 13 L.Ed. 220 (1850), affirmed the general conclusion the Court had previously reached in *Pollard*, but qualified the rule by saying that undoubtedly, Congress might have granted the land which was under the navigable water at the time of Statehood to the grantee under the Spanish grant and patentee under the Act of Congress before Alabama became a State, but that Congress did not do so. The reasons why Congress did not do so are fully discussed in authorities which will be presented hereinafter.

The case of *Weber* v. *State Harbor Commissioners*, 18 Wall. 57, 21 L.Ed. 798 (1873), involved the jurisdiction of the City of San Francisco, which it had derived from the State of California, over the navigable water bottoms in San Francisco Bay. The Court in discussing the fundamental proposition stated:

"Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the

admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soil in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states the regulation of which was vested in the general government. *Pollard* v. *Hagan*, 3 How. 212; *Mumford* v. *Wardwell*, 6 Wall. 436, 18 L.ed. 761."

The case of *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893) involved the title in certain lands below the high water mark in the Columbia River in the State of Oregon, one party claiming under the United States and the opposing party claiming under the State of Oregon. Mr. Justice Gray, observing that the briefs submitted disclosed such a diversity of view as to the scope and effect of previous decisions of the Supreme Court upon the subject of public and private rights in lands below high water mark of navigable waters, stated that this was a fit occasion for a full review of those decisions, and a consideration of other authorities upon the subject. His opinion is a most thorough and exhaustive analysis of the previous decisions and of the law as developed in those decisions and as it appeared to the Court in this case. The Court then expressed the law with which we are concerned in apt and accurate language as follows:

"By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can im-

pose laws upon them, have the entire dominion and sovereignty, national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition. *American Ins. Co.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet 511, 542 (7:242,255); *Benner* v. *Porter*, 50 U.S. 9 How 235, 242 (13:119, 122); *Cross* v. *Harrison*, 57 U.S. 16 How. 164, 193 (14:889, 901); *First Nat. Bank of Brunswick* v. *Yankton County*, 101 U.S. 129, 133 (26:1046, 1047); *Murphy* v. *Ramsey*, 114 U.S. 15, 44 (29: 47, 57); *Mormon Church* v. *United States*, 136 U.S. 1, 42, 43 (34:478, 491); *McAllister* v. *United States*, 141 U.S. 174, 181 (35: 691, 695).

"*We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects of which the United States hold the territory.*

"IX. *But Congress has never undertaken by general laws to dispose of such lands.* And the reasons are not far to seek.

"As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that *jus publicum* which belongs to the King's subjects,' or as he elsewhere puts it, 'is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse.' Hargrave's Law Tracts, 36, 34. In the words of Chief Justice Taney, 'the country' discovered and settled by Englishmen 'was held by the King in his public and

regal character as the representative of the nation, and in trust for them;' and *the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be established;' and, upon the American Revolution, vested absolutely in the people of each state* 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367, 409-411 (10:997, 1012, 1013). As observed by Mr. Justice Curtis, 'This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights.' *Smith* v. *Maryland*, 59 U.S. 18 How. 71, 74 (15:269, 270). The title to the shore and lands under tide water, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the state —a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.' *Hardin* v. *Jordon*, 140 U. S. 371, 381 (35:428, 433). And *the territories* acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, *are held* with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects: *and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, 'in trust for the future states.'* *Pollard* v. *Hagan*, 44 U. S. 3 How. 212, 221, 222 (11:565, 570); *Weber* v. *State Harbor Comrs.*, 85 U. S. 18 Wall. 57, 65 (21:798, 801); *Knight* v. *United Land Asso.*, 142 U. S. 161, 183 (35:974, 981).

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the

coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; *but that the navigable waters and the soils under them,* whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, *shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union,* with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community." (Emphasis ours.)

Thus we see that Congress has the power to make grants of land below high water mark of navigable waters in any territory of the United States only under certain very limited circumstances which in this opinion are expressed as follows: (a) Whenever it becomes necessary to do so in order to perform international obligations; (b) To effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states; (c) to carry out the public purposes appropriate to the objects for which the United States holds the territory. Certainly no one of the purposes would be effected by transfer by Congress to the Indian Tribes or to

Indian allottees or to any individuals of the bed of the navigable portion of the Arkansas River below high water mark.

The Oklahoma Supreme Court has addressed itself expressly to the question whether the Cherokees come under any one of the exceptions to the general policy of the United States set out in the opinion of *Shively* v. *Bowlby*. In the case of *Vickery* v. *Yahola Sand & Gravel Co.*, 12 P.2d 881 (1932), Vickery, a Cherokee, held a Cherokee allotment abutting upon the Arkansas River a short distance below its confluence with the Grand River. He sued Yahola Sand & Gravel Co. to recover for sand and gravel it had removed from the river bed opposite Vickery's allotment. The trial court found for the defendant and on appeal to the Oklahoma Supreme Court the State intervened and filed a brief. The court considered the pertinent treaties with the Cherokees, and furthermore considered whether it had been necessary for the United States to convey the bed of this navigable stream to the Cherokees in order "to carry out other public purposes appropriate to the objects of which the United States hold the territory." *This is precisely the proposition argued by the Cherokees and the principle argued by the Choctaws.* In holding in favor of the defendant and the state and against Vickery, the Cherokee allottee, the court's opinion applied against the tribal claims as well as against the allottee when it said:

> "The question then arises: Has Congress exercised the power by the grant of the lands involved to the Cherokee Indian Tribe by the treaty with the Western Cherokees of May 6, 1828 (7 Stat. 311), as supplemented and modified by the Treaty of February 14, 1833 (7 Stat. 414), reaffirmed and ratified in the Treaty with

the Cherokees at New Echota, Ga., December 29, 1835 (7 Stat. 478), whereby the lands on both sides of the Arkansas river from above the mouth of the Neosho or Grand river to the confluence of the Arkansas and Canadian rivers was granted to the Cherokees?

"The lands here involved were included within the above grant, and as stated above it is conceded that the Arkansas river where it flows along said land is and was at that time navigable.

"The treaties made no specific mention of rivers, navigable or non navigable, within the boundaries of the grant.

* * * * * * *

"Nothing in the treaties will be found showing that it was necessary to convey the title to the bed of the Arkansas river, where it was in fact navigable, to the Cherokee Tribe in order to perform an international obligation. Neither is such necessity shown in order to effect the improvement of such lands (within the bed of the river) for the promotion and convenience of commerce with foreign nations and among the several states.

"Considering the several Cherokee treaties, acts of Congress, and conveyances in the light of the times and circumstances in which they were made, and giving full force to the rule of interpretation set forth in the opinions of the Circuit Court of Appeals in the *Brewer-Elliott* Case, *supra, nothing appears that would make it necessary to convey the bed of the navigable stream to the Cherokee Tribe in order to carry out any public purposes appropriate to the objects for which the United States held the territory embracing the lands granted.* The territory embracing the lands was a part of the Louisiana Purchase. The declared purpose of the Louisiana Purchase Treaty with France was that statehood should be ultimately conferred upon

the inhabitants of the territory purchased, though this purpose was in a measure departed from in the treaties, in that by article 5, of the Treaty of New Echota (7 Stat. 481), it was provided: 'Article 5. The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.' But ultimately the purpose, as originally declared, has been accomplished.

"The only other purpose appropriate to the objects for which the United States held the land that has been suggested was to provide a permanent home for the several Indian Tribes.

"[5, 6] We see nothing in the treaties or acts of Congress, considering the times and circumstances in which they were made, and the relation between the contracting parties, that would render it necessary to convey the title to the bed of navigable rivers within the lands granted to the Cherokees in order to carry out the purpose of providing a permanent home for the tribe.

"On the other hand, it would appear to the best interests of the tribe in full enjoyment and possession of the home thus provided that the navigable rivers within the lands should be and remain public highways. The Cherokee Indians were not then extensively engaged in commerce but rather an agricultural people. Aside from marketing their agricultural products, their trade and commerce consisted largely of barter and trade between themselves and with certain designated and licensed traders permitted to trade within their country. It was highly necessary at that time, for the benefit of the Cherokees as well as other Indian tribes located on adjacent lands that the navigation of the Arkansas river, as far up its course as the same was navigable, be kept open and free, and for this purpose it would

appear far better that the title to the bed of the stream, where navigable, be kept and held in the United States, for the ultimate use and benefit of the future state, if and when, by the consent of the Cherokee Tribe, a state should be erected embracing the lands so granted to them.

"This would be in accord with the general policy of the United States and the theory upon which the Congress of the United States has constantly acted in disposing of the public lands, stated in *Shively* v. *Bowlby, supra,* as follows: 'The congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and the flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless, in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community.

"*We are, therefore, of the opinion that neither by express terms nor by intention of the contracting part-*

ies did the title to the bed of the Arkansas river, where the same was navigable in fact, pass from the United States to the Cherokee Nation within the bounds of the tracts of land granted by the United States to said tribe under and by virtue of the treaties mentioned, but that it was retained and held by the United States in trust for the then future state, and that upon admission of the state of Oklahoma to the Union in 1907, the title thereto vested in and became the property of the state of Oklahoma. The Cherokee Tribe having acquired no interest in or title to the bed of the Arkansas river below high-water mark where it flows along the land involved, it follows that plaintiff in error acquired no right, title, or interest in or to the lands within the bed of the river below high-water mark.

"The judgment is affirmed." (Emphasis ours.)

The United States Supreme Court has spoken on this subject.[2]

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[2]The suit of *Oklahoma* v. *Texas*, 258 U.S. 574, 66 L.Ed. 771 (1922), was brought to determine the true boundary between the States of Oklahoma and Texas, and to determine the ownership of the bed of the Red River between these two States, particularly in the so-called Big Pasture Area (approximately 43 miles of the River beginning at the 100th parallel and running east). The United States, by the court's leave, intervened as a party in interest on behalf of Indian allottees and in its proprietary capacity. The court held that its decision in the *United States* v. *Texas*, 162 U.S. 1, 40 L.Ed. 867 (1895), was res judicata, final, and conclusive upon the parties as to said boundary, to-wit: That under the Treaty of 1819 between the United States and Spain, the boundary was fixed as the south bank of the Red River and the United States acquired full title to the bed of river pursuant to this Treaty. The court further found that the Red River is not navigable anywhere along its course within the State of Oklahoma.

Although ownership of the bed of the Red River, not the Arkansas River, was in issue in this case, the Court did make the following important statement (at page 583) which bears on the case at hand:

"Oklahoma claims complete ownership of the entire bed of the river within that state, and, in support of its claim, contends that the river, throughout its course in the state, is navigable, and, therefore,

This Court, in the case of *United States of America* v. *Holt State Bank*, 270 U.S. 49, 70 L.Ed. 465 (1925), dealt with a situation where the United States had by treaties granted an area, which encompassed entirely within its outer boundaries a navigable lake, to the Chippewa Indians. This Court held that the bed of the navigable lake was not covered by the grant to the Indians, because the intent to include the bed of the lake was not definitely declared or otherwise made very plain in the applicable treaties. This case is in point.

We find in the briefs filed in behalf of Petitioners and *Amici Curiae* herein persistent misunderstandings of the

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[2] (Continued)

that, on the admission of the state into the Union, on November 16, 1907 [34 Stat. L. 2160], the title to the river bed passed from the United States to the state, in virtue of the constitutional rule of equality among the states, whereby each new state becomes, as was each of the original states, the owner of the soil underlying the navigable waters within its borders. *If that section of the river be navigable, its bed undoubtedly became the property of the state under that rule.*" (Emphasis ours.)

By the Treaty of June 22, 1855 (11 Stat. L. 611), the boundaries of the Choctaw-Chickasaw country were fixed as follows:

"Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary line of the state of Arkansas crosses the said river, and running thence due south to Red River, thence up Red River to the point where the meridian of one hundred degrees West longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River, thence down said river to the place of beginning."

Inasmuch as the same kind of language was used with respect to the Arkansas River (* * * down said river * * *), as was used with respect to the Red River (* * * up Red River * * *), the above-quoted statement must be considered as also applicable to the ownership of the bed of the Arkansas River as well. No basis for any distinction exists—the section of the Arkansas River under consideration in the case at hand being navigable, its bed undoubtedly became the property of the State of Oklahoma upon its admission to the Union.

facts and misconstructions of the holding of this Court in *Holt State Bank*. We here state our understanding of the facts and the holding of this Court in *Holt State Bank* as it applies to this case.

Before Minnesota became a state in 1858, the Chippewas had been the aboriginal inhabitants of a large part of northern Minnesota, and in particular a part that encompassed a lake known as Mud Lake. By a series of treaties with the United States made before Minnesota statehood it was agreed that the Chippewas relinquish their aboriginal right of occupancy to the general area (not their title; for title was then in the United States by conquest from England), and that in exchange, title to certain areas known as "reservations" was vested in the Chippewas. Two of those treaties were cited in the opinion of the Court in *Holt State Bank* (Treaty of September 30, 1854, 10 Stat. L. 1109 and Treaty of February 22, 1855, 10 Stat. L. 1165). Both treaties contain provisions for the eventual allotment of lands in the reservations to tribal members. One reservation was known as the Red Lake Indian Reservation. Mud Lake was within that reservation. In 1889, pursuant to an act of Congress, provision was made that the Chippewas should cede back to the United States most of the Red Lake Indian Reservation including the part in the vicinity of Mud Lake; that the United States should then divide the land thus ceded and classify it as pine lands and agricultural lands; that the United States should dispose of the lands for cash considerations; and that the sums realized should be put in an interest-bearing trust fund for the Chippewas and ultimately disbursed for their benefit or distributed among them. *If the Chippewas had acquired no*

title to the Red Lake Reservation by the treaties prior to Minnesota statehood (as argued by counsel for Petitioners) why was provision made therein for allotment to tribal members and why was provision made in the 1889 Act to have the Chippewas cede the lands to be sold back to the United States? The United States did recognize the title of the Chippewas to the Red Lake Reservation and did not undertake to sell the lands located therein until they were ceded by the Chippewas back to the United States so that the United States could sell and convey them. Among the tracts disposed of as agricultural lands under this 1889 Act were certain tracts bordering on Mud Lake. These tracts were sold to certain settlers, who thus became riparian owners, and patents were issued to them. Later, when Mud Lake was drained, large areas of land were laid bare which were adjacent to the tracts on the shore of Mud Lake which had been sold to settlers. The riparian owners along the lake front contended that the lake was navigable when Minnesota became a state and that under the laws of Minnesota they were entitled to the land laid bare by the drainage and adjacent to their tracts. On the other hand, the United States insisted in behalf of the Chippewas that the lake was never more than a mere marsh and was not navigable and therefore the United States was entitled and was duty bound to dispose of the land under the Act of 1889 for the benefit of the Chippewas. The Court held that Mud Lake was a navigable body of water, and that under the treaties with the Chippewas prior to Minnesota statehood, there was no definite declaration that the United States intended to convey the bed of the navigable water bodies to the Chippewas or to recognize the bed of the navigable water bodies as belonging to the Chippewas even

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349, 352. 14 Sup.Ct.Rep. 548; *Sc*
229, 242. 57 L.ed. 490, 496. 44
Sup.Ct.Rep. 242; *Seattle* v. *Ore*
U.S. 56, 63, 65 L.ed. 500, 506
Brewer-Elliott Oil & Gas Co. v.
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Rep. 548, the United

States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so *has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency.* It follows from this that *disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.*" (Emphasis ours.)

Among the authorities cited in the *Holt State Bank* case is the case of *Shively* v. *Bowlby*, 152 U.S. 1, 38 L.Ed. 331 (1893). As stated in *Shively* v. *Bowlby*, no grants of land have been made by Congress of lands under navigable waters in any territory of the United States unless it became necessary to do so for one of the following purposes: (1) to perform international obligations, or (2) to promote commerce with foreign nations and among the several states, or (3) to carry out the public purposes appropriate to the objects for which the United States holds the territory—and the Court in *Holt State Bank* adds (4) *that if the United States intends to dispose of lands in a territory under navigable water for any of the three foregoing reasons such intent must be "definitely declared or otherwise made very plain."*

The decision in *Holt State Bank* is in harmony with rules of law established covering public grants of riparian lands bounded by navigable waters. The general rule with respect to grants such as were involved in the *Holt State Bank* case is stated in 65 C.J.S. at 359 under Section 120 of the Title "Navigable Waters" and is as follows:

"A public grant of riparian land bounded by navigable water is generally construed strictly against the grantee in determining whether title to land under water passes to the grantee, and usually title to land under water is not transferred by such a grant."

In an attempt to show authorities affecting Indians that are contrary or different from the cases we have cited above, counsel for Petitioners and counsel for *Amici Curiae* have called attention to certain cases which we may for the purpose of comment characterize as the "fishing Indian cases" and as the "specific boundary cases." Where *Holt State Bank* was considered in any of those cases, the court did not find any conflict with the rule in *Holt*, but found there were substantial distinctions in the facts. Even in the cases that did not cite *Holt*, similar factual distinctions existed. One case cited is *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946). Here the issue was confined to the right of control of fishing by the Director of Fisheries and the Director of Game of the State of Washington in a small area at the mouth of the Quillayute River, which was included in the Quillayute Indian Reservation. The evidence showed that the Quillayutes were granted this small area at the mouth of the Quillayute River so that they might sustain themselves by fishing on the adjacent waters, and it further showed that these Indians made their living by fishing, whaling and taking fur seals, and that accordingly, the use of the fishing grounds adjacent to their small reservation was absolutely essential to their livelihood. The Court distinguished *Holt State Bank* and found that there was no conflict with the fact situation in the *Moore* case and it said:

> "In the *Holt State Bank* case there is no evidence of the use of the navigable waters with reference to established industries of the Indians, as in the Annette Island and instant case, which, were operated in part on a portion of the river inside the lands reserved, with the uselessness of the sandspit save to enclose the river and to facilitate fishing therein."

The *Annette Island* case referred to in the *Moore* case is *Alaska Pacific Fisheries* v. *U. S.*, 248 U.S. 78, 63 L.Ed. 138 (1918). This was a suit by the United States to enjoin Alaska Pacific Fisheries from maintaining and operating a fish trap erected by it in navigable waters at the Annette Islands in Alaska. In 1891 Congress had passed a statute providing (among other things) that "the body of lands known as Annette islands * * * is hereby set apart as a reservation for the use of the Metlakahtla Indians." In affirming the decision of the two lower courts which enjoined Alaska Pacific Fisheries the Court said:

> "The circumstances which we have recited shed much light on what Congress intended by the 'the body of lands known as Annette islands.' The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location."

In *Donnelly* v. *U. S.*, 228 U.S. 243, 57 L.Ed. 821 (1913), a murder prosecution was involved under which, for jurisdiction purposes, the ownership of the river bed of the Klamath River was involved. The river bed lay in an extension of Hoopa Valley Reservation to include a tract of country one mile in width on each side of the Klamath River and extending from said reservation to the Pacific Ocean. The

Court declared, in holding the river bed to be included in the Indian Reservation, "It would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river and at the same time to exclude the river." The Court also cited the history of the Indians in making their principal living from fishing these waters.

Each of the "specific boundary cases" is distinguishable from our case, for in each the boundary in dispute was clearly and specifically described and thus no one case is similar to our case. Those cases are *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (C.C.A. 9th Cir. 1942); *U. S.* v. *Romaine*, 255 Fed. 253 (C.C.A. 9th 1919); *U. S.* v. *Stotts*, 49 F.2d 619 (D.C. W.D. Washington 1930).

Thus it is seen that the decisions in *Holt State Bank* and other cases cited by us above are untouched and unaffected by the decisions cited by counsel for Petitioners and for *Amici Curiae*.

Under the facts of this case, the State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it was admitted as a State on an equal footing basis. No conveyance by the United States of the navigable portion of the Arkansas River bed had been made previous to Oklahoma statehood.

II

THE TREATIES AND THE PATENTS DO NOT PROVIDE FOR THE CONVEYANCE OF THE ARKANSAS RIVER BED TO EITHER THE CHEROKEES OR THE CHOCTAWS.

In construing the language of the treaties and the patents let us keep in mind that rule established in *Holt State Bank* "that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." That rule is an expression of the policy of the United States with respect to territorial lands under navigable waters, ably discussed and thoroughly analyzed in *Shively* v. *Bowlby* and other decisions presented herein.

This section of our Argument will be presented in three parts which will be as follows:

A. *No public purpose would have been served by the granting of the bed of the navigable portion of the Arkansas River to either of Petitioners.*

B. *The treaties and patents and contemporaneous circumstances show that the United States did not intend to cede the river bed to either of Petitioners.*

C. *The intention expressed in the treaties and patents was to provide for conveyance to each of Petitioners of a general area or a specified quantity of land, and each reference to the Arkansas River was solely as a boundary, a monument or a reference point.*

A. NO PUBLIC PURPOSE WOULD HAVE BEEN SERVED BY THE GRANTING OF THE BED OF THE NAVIGABLE PORTION OF THE ARKANSAS RIVER TO EITHER OF PETITIONERS.

Counsel for Petitioners and for *Amici Curiae* having failed to show a specific commitment to convey or conveyance by the United States of the river bed, apparently contend that such a purpose to convey could be inferred because they say it is necessary "to carry out the public purposes appropriate for the objects for which the United States holds the territory," one of the exceptions stated in *Shively* v. *Bowlby* to the general rule that the navigable waters and the soils under them shall not be granted away during the period of territorial government.

The "public purpose" is absent when one considers the advanced state of civilization attained by these tribes. These were not grants of land to primitive peoples for fishing and hunting grounds. It should be clearly understood at the outset that the Cherokees, Choctaws and Chickasaws were not primitive aboriginal people who knew nothing of the ways and customs of the white people, the citizens of the United States with whom they were dealing. In fact, these tribes, along with the Creeks and the Seminoles, who formerly lived in Alabama and Florida, were aptly called the "Five Civilized Tribes" in order to be distinguished from the wild and savage Plains Indians.

It should also be borne in mind that there were frequently great divisions and differences of opinion among the Indians, themselves, as to what course they should follow. Some advocated that they should completely isolate themselves from the white people and follow their own

customs and ways, and their own laws, and others urged that they should abandon the old ways and become citizens of the United States, arguing "if you can't whip them, join them." This is borne out by the fact that only a small number of the Cherokees made the first migration to Arkansas.

After the move westward this division of opinion continued. John Ross and Elias Boudinot were the leaders of rival factions, who disagreed bitterly as to what the policy of the Cherokees should be. Each had his followers and supporters, but many of the members of the tribe were undecided as to what they should do.

The argument that the Indians could benefit from citizenship in the United States was confirmed after the amalgamation was accomplished. To illustrate with only a few, Robert L. Owen, a Cherokee, was U. S. Senator for many years. William Hastings, a Cherokee, was elected to the Congress of the United States. Houston B. Teehee, another Cherokee, was appointed and served as Treasurer of the United States. Patrick J. Hurley, a Choctaw, served with distinction as Secretary of War. Many members of these tribes have served with dignity and distinction in the judiciary, as well as in the legislative and executive branches of our state and national governments.

The leaders of these Indian tribes who negotiated the treaties with the United States are not shown to be ignorant, uneducated savages. How many of them were partly descended from "white people" is not known, but every indication is that a substantial number of the leaders were partly "white." Many of these Indians worked long and hard in their advocacy of the cause of statehood.

When the Final Rolls of the Cherokee, the Choctaw and the Chickasaw Nations were prepared by the Dawes Commission, a record was made of (1) the name of the Indian, (2) his or her age, calculated to a date certain, (3) the sex of the Indian, (4) the quantum or percentage of the Indian blood of the enrollee, and (5) the number assigned to the census card, as a guard against duplicate enrollments. It is of interest to note that for the Cherokees there were 32,926 originally enrolled whose age was calculated to September 1, 1902, with 4,991 additional children, the "after-borns," enrolled, whose age was calculated to March 4, 1906. Of these approximately 38,000 Indians, only slightly more than 6,000 were full bloods. The part bloods ranged downward from 15/16ths to as low as 1/128th. Apparently if the quantum of blood was less than 1/128th they were not considered to be Indian. It is of interest to note the many fine old English, Scotch, French and Irish names of these Indians!

The same system was followed in enrolling the Choctaws and the Chickasaws. There were 16,227 Choctaws enrolled with ages calculated to September 25, 1902, on the so-called "Final Roll," with 1,583 "new borns," age calculated to March 4, 1905, and 956 minor Choctaw citizens by blood, age calculated to April 26, 1906, later added. Of these 18,766 Choctaw citizens only 6,645 were full bloods, with the quantum of blood of the enrolled citizens running as low as 1/128th.

Of the approximately 6,000 Chickasaws enrolled, including the "after-borns" with ultimate age calculated to March 4, 1906, only 1,432 were full bloods, with the percentage of Indian blood again being as low as 1/128th.

The Choctaws had 5,546 freed slaves enrolled as members of their tribe. Practically all of these slaves, who were not freed until the end of the Civil War, were Negroes who had been used by the Choctaws as laborers on their farms and plantations.

The Chickasaws had 4,853 freed slaves enrolled as members of their tribe. As with the Choctaws, most of these slaves were Negroes, and they also had been utilized in agriculture, for the main part.

The Cherokees had no "Freedmens Roll." Their former slaves were adopted into the tribe as members or permitted to leave, as they chose.

It seems hardly plausible that this dilution of Indian blood could have come about during the relatively short span of time intervening between the removal of the Indians to the Indian Territory, around 1830, and the preparation of the Final Rolls in 1906. At least eight generations are required to reduce from a full blood to a 1/128th blood.

When these farmers moved westward it would have been most unusual if they had abandoned their former ways of life and reverted to a nomadic status, living off the land and what wild game they could find. In fact, they did not. They settled down on farms, built homes, schools and churches, as the Cherokees point out.

There was no exceptional circumstance or international duty or public exigency existing which would impel the United States to divest itself of this public highway. Even as was the case with the Red River, which constituted the southern boundary of the Louisiana Purchase and the boundary with Texas, the United States wanted this

highway to remain open for all persons, whether they were Cherokees or Choctaws or not. Some thirty-odd other Indian tribes were being settled in this Territory, and it was essential that the benefits of the highway remain available for all who needed them. It would be absurd to say that the United States wanted to give it to the Cherokees or Choctaws and to deprive the numerous other tribes of the benefits arising therefrom.

There is nothing to indicate that the lack of ownership of the bed of this river would in any way adversely affect the rights or lives of these Indian tribes. Ownership remained in the United States. The Indians were given the use of the waters along with all others who might need to use them. Their use was not dependent upon ownership, but was the result of a permit, or license, from the United States.

The Oklahoma Supreme Court efficiently disposed of that "public purpose" contention over thirty-five years ago, in the case of *Vickery* v. *Yahola Sand and Gravel Co.*, in the language quoted in Section I above. Suffice it to say that even though neither the Cherokee Nation nor the State was named as a party to the action, both knew of the pendency of the action and were aware that Vickery was asserting ownership adverse to the Cherokees and the State. The State intervened in the action on the side of its lessee, but the Cherokee Nation elected to abstain, notwithstanding Vickery's claim of adverse ownership. If the Nation had then thought it owned this river bed, surely it also would have intervened and sought to establish its claims against its allottee, the State, and the State's lessee.

Counsel have cited no authority whatsoever to show that United States acquired or held the Louisiana Territory for the purpose of later conveying the beds of the navigable streams in Oklahoma to the Cherokees or Choctaws. The object for which the United States held the territory acquired in the Louisiana Purchase was, in the language of President Jefferson, to make "an ample provision for our posterity, and a wide spread for the blessings of freedom and equal laws." As shown in Section I of this brief, President Jefferson in his letter to Senator Breckenridge envisioned formation of states "range after range, advancing compactly as we multiply" in the Louisiana Purchase lands notwithstanding "establishments in it to the Indians." We shall discuss in more detail under Section IV the fact that a future state, or states, was contemplated for the area in which Petitioners were established. Even if we concede, for the purpose of argument, that an object for which the United States held the territory was to find a place to settle the Cherokees and Choctaws, nevertheless there is nothing whatsoever to show that to achieve that purpose or object it would be necessary to convey to them the bed of the navigable water. And furthermore, the United States did not agree to convey and did not convey that river bed. The Supreme Court, quoting the English Judge, Sir William Scott, has said in *Shively* v. *Bowlby*:

> " 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be in-

tended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' *The Rebeckah,* 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.*, 36 U.S., 11 Pet. 420, 544-548 (9:773, 822-824); *Martin* v. *Waddell,* 41 U.S., 16 Pet. 367, 411 (10:997, 1013); *Central Transp. Co.* v. *Pullman Car Co.*, 139 U.S. 24, 49 (35:55, 64)."

B. THE TREATIES AND PATENTS AND CONTEMPORANEOUS CIRCUMSTANCES SHOW THAT THE UNITED STATES DID NOT INTEND TO CEDE THE RIVER BED TO EITHER OF PETITIONERS.

The discussion of the pertinent treaties and patents which follows will fully substantiate our contentions. They are listed in chronological order with a brief description concerning the nature of each.

CHEROKEE TREATIES AND PATENT

1. *Treaty of July 8, 1817, 7 Stat. L. 156.* This treaty covered a cession of land occupied by the Cherokee Nation in return for lands near the Arkansas and White Rivers. Of interest is the fact that Article 5 describes the lands granted to the Cherokee Nation on the Arkansas River as commencing:

> ". . . on the *north side of the Arkansas river* at the mouth of the Point Remove or Budwell's Old Place; thence, by a straight line, northwardly, to strike Chataunga Mountain, or the hill first above Shield's Ferry on White River, . . ." (Emphasis ours.)

Removal was entirely voluntary under this treaty, but there was no national will for the individual Indians to remove themselves from their eastern lands to the wilds of the western country in Arkansas.

2. *Treaty of May 6, 1828, 7 Stat. L. 311. This treaty was negotiated with the western Cherokees* to define the limits of the Cherokees' new home in the West—limits which were different from those contemplated by the treaties of 1817 and 1819—and included the following promise:

> "ARTICLE 2
>
> "The United States agrees to possess the Cherokees, and to guarantee to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz:
>
> "Commencing at that point on the Arkansas River where the Eastern Choctaw boundary line strikes said River, and running thence with the Western line of Arkansas, as defined in the foregoing article, to the South West corner of Missouri, and thence with the Western boundary line of Missouri till it crosses the waters of Neosho, commonly called Grand River, thence due West to a point from which a due South course will strike the present North West corner of Arkansas Territory, thence continuing due South and on with the present Western boundary line of the Territory to the main branch of the Arkansas River, thence down said River to its junction with the Canadian River; and thence up and between said Rivers Arkansas and Canadian, to a point at which a line running north and south from River to River, will give the aforesaid seven millions of acres . . ."

The signatory parties to this treaty were the United States and "the Chiefs and the HeadMen of the Cherokee Nation

of Indians, *West of the Mississippi*, they being duly authorized and empowered by their Nation." *Since this was not executed by those Cherokees remaining in the East, it was not binding on the great majority of the Cherokees.*

3. *Treaty of February 14, 1833, 7 Stat. L. 414.* This was another treaty made with the Chiefs and HeadMen of the Cherokee Nation of Indians *West of the Mississippi*, and it guarantees those lands described in Article 2 of the Treaty of May 6, 1828, cited above. Under Article 1 of that treaty the United States agrees to:

> ". . . possess the Cherokees and to guarantee it to them forever, and that guarantee is hereby pledged of seven millions of acres of land to be bounded as follows, viz:—Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point, where the territorial line crosses Arkansas River; thence running from said north point, south, on the said Territorial line, to the place 'where said Territorial line crosses the Verdigris River; thence down said Verdigris River to the Arkansas river; thence down said Arkansas to a point, where a stone is placed opposite to the east or lower bank of Grand river, at its junction with the Arkansas; thence running south, forty-four degrees west, one mile; thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian; thence along the said four miles line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas, to the point on the Arkansas, where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand

> River, as far as the south line of the Osage reservation, extended if necessary; thence up and between said south Osage line, extended west if necessary, and a line drawn due west, from the point of beginning, to a certain distance west, at which a line running north and south, from said Osage line, to said due west line, will make seven millions of acres within the whole described boundaries . . ."

Through constant overtures from Washington and the harrassment of hostile legislation it became clear to the Cherokees that removal was imminent, either voluntarily or by compulsion. They chose, though not without internal turmoil, to remove voluntarily.

4. *Treaty of December 29, 1835, 7 Stat. L. 478. This is the treaty commonly referred to as the Treaty of New Echota, and it is the basis for the patent issued to the Cherokees by the United States of December 31, 1838. This was also the first treaty in which the United States agreed with the Cherokees BOTH EAST AND WEST.* Article 2 therein recites the previous quoted sections from the treaties of May 6, 1828, and February 14, 1833, with the Cherokees west of the Mississippi. Delegates from the Western Cherokees agreed to the provisions of this treaty "in behalf of the western Cherokees." Thus, this is the principal agreement relating to the removal encompassing those who had voluntarily removed west and those constituting the great majority of the tribe that had chosen to remain on the eastern lands.

5. *The patent to the Cherokees dated December 31, 1838, was issued pursuant to the treaties of May 6, 1828, February 14, 1833, and December 29, 1835.* It provides, in

part, that the United States has caused the seven million acres to be surveyed in one tract and states with respect to the lands under dispute:

> ". . .; thence down the Canadian river on its north bank, to its junction with Arkansas river; *thence down the main channel of Arkansas river, to the Western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the South bank of Arkansas river, four chains and 54 links, East of Fort Smith;* thence north seven degrees, twenty-five minutes west, with the western boundary of the State of Arkansas, seventy six miles, sixty four chains and fifty links to the Southwest corner of the State of Missouri;" (Emphasis ours.)

This description was prepared from the field notes of surveys made under the direction of Isaac McCoy which are discussed later in this brief. The Arkansas River is (and was then) a meandering stream and the reference to the main channel was to emphasize the main portion of the Arkansas River as distinguished from secondary channels or oxbow lakes resulting from "cut-throughs." *This description establishes without doubt that the northeast corner of the lands of the Choctaws was on the south bank of the Arkansas River.* Further analysis shows that this boundary is not described as being the center line of the River (for that portion from the mouth of the Canadian to the Arkansas state line), or the south bank thereof, but "thence down the main channel of the River to the Western boundary of the state of Arkansas." Surely McCoy knew the difference between the north bank, the middle of the stream, and the south bank, for he had just concluded a line on the north bank of the Canadian. Why then did he not state on

the north bank of the Arkansas River if that is what was intended? For the reason just stated, the Arkansas was a meandering, wandering stream with many threads or channels between the cut banks. He (McCoy) had to distinguish between those threads and that which constituted the "cloth" of the River. He was also guided by the description in Article 2 of the Treaty of May 6, 1828, in which the signatories described "the *main branch* of the Arkansas River" apparently in the belief that other branches existed. With respect to the Canadian River on the other hand, where the line expressly followed the "north bank," we think it is reasonable to assume that the parties to the grant felt this specification was necessary where the boundary was a *non-navigable stream.*

After the line which runs "down the main channel of the Arkansas River, to the Western boundary of the State of Arkansas," the description then refers to the northern extremity of the eastern boundary of the land of the Choctaws on the South bank of the River. Thus, it appears that the surveyor used the northeast corner of the Choctaw lands as a monument or reference point. We submit that "opposite" the northern extremity of the eastern boundary of the land of the Choctaws would have been more meaningful than "at" the northern extremity.[3] *However, an examination of the survey plat made by McCoy and from which this patent was prepared makes it clear that the southern boundary of the Cherokees from the mouth of*

[3]For a similar meaning of the term, see The Treaty of Doak's Stand, 7 Stat. L. 210, and Treaty of July 8, 1817, 7 Stat. L. 156, described in Section IIc. For example also, in construing a description in a deed, "at" signifies nearness and is a relative term. 23 Am.Jur.2d *Deeds* 243.

the Canadian to the Arkansas state line follows the north bank of the Arkansas River.[4] Equally conclusive, the field notes of the survey of the eastern boundary of the Cherokees[5] made in 1831 under McCoy's[6] direction are absolute in their terminology:

> "Miles 76. Thence at 12.50 chains left the canebrake and entered an open prairie bottom—rich soil, 50 chains to cane again; 80 chains to the *north bank of Arkansas River*—set a stake and made round it, from which L 64° 20′ W., a cottonwood, marked C. L. 76 M. S. 36° 00′ E. a cottonwood marked U.S. 76M. *At this point is fixed the southeast corner of the Cherokee lands; 77 M.* Thence along the channel of the river 64.50 chains to *the south bank where the northern extremity of the eastern boundary of the Choctaw lands strikes the Arkansas River.*" (Emphasis ours.)

The corners are clearly located by this survey, the southeast corner of the Cherokee lands being on the north bank of the Arkansas River, and the northeast corner of the Choctaw lands on the south bank of the River.

The above field note was excerpted by counsel for Cherokees at page 30 of their brief, and, for obvious rea-

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[4]Appendix 3—The broad line denoting boundary follows the north bank of the River from the mouth of the Canadian to the Arkansas state line.

[5]Appendix 4—Miles 7 thru 68 of the field notes have been omitted. These are not pertinent to this brief.

[6]The Court may be interested in the background of Isaac McCoy who directed these surveys. For many years, he (McCoy) played a prominent role in dealings with the Cherokees and other Indians. "Advancing the Frontier," by Grant Foreman. Senate Document No. 281, 52nd Congress, 1st Session, February 25, 1892, contains a letter dated July 5, 1836, from C. A. Harris, then Commissioner of Indian Affairs, to Reverend Isaac McCoy which directs Mr. McCoy to employ a competent surveyor and to run and mark the lines established in the Treaty of New Echota.

sons, they omitted that portion of the note which fixed "the southeast corner of the Cherokee lands" on the "north bank of the Arkansas River." Counsel apparently failed to check the appendix of their own brief at page F-12 where the field note for Miles 76 is set out in full as above. For convenience, a reproduction of the handwritten copy of the pertinent field note as it appears in the National Archives is included as our Appendix 4.

CHOCTAW TREATIES AND PATENT

1. *Treaty of October 18, 1820, 7 Stat. L. 210. The Treaty of Doak's Stand.* This is the first agreement concerning the cession by the Choctaw Nation of land east of the Mississippi in exchange for lands west of the Mississippi. Article 2 of this treaty describes the lands to be ceded as:

> "Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian Fork, . . ."

2. *Treaty of January 20, 1825, 7 Stat. L. 234.* This was a treaty in which the Choctaws ceded that part of their land now in the State of Arkansas to the United States.

3. *Treaty of September 27, 1830, 7 Stat. L. 333. The Treaty of Dancing Rabbit Creek.* (This treaty is supplemented by Treaty of January 17, 1837, 11 Stat. L. 573). It provides:

> "All other treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void."

Our statements concerning the Treaty of New Echota apply with equal validity to the Treaty of Dancing Rabbit

Creek. From the uncluttered language of this treaty and the subsequent patent, it is manifest that there was no purpose to grant the Arkansas River or any part thereof to the Choctaws. Article II of the treaty provides for a conveyance of the same land described in the Treaty of Doak's Stand.

Article IV provides:

> "The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; *but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and laws of the United States; . . .*" (Emphasis ours.)

Since it was established law that lands under navigable waters be reserved for the ultimate benefit of future states "unless the intention was definitely declared or otherwise made very plain," and no intention or definite declaration to this effect was made in this treaty or any other treaty with the Choctaws, it then follows that a construction of this treaty that it covered lands beneath navigable waters would result in an inconsistency with the laws of the United States—and that is expressly prohibited by the language quoted above.

Counsel for the Choctaws has argued that Article XI of this treaty is not indicative that the Choctaws did not receive lands beneath navigable waters. It provides:

> "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the United States. It is agreed further that the United States shall establish one or more post offices in said Nation, and may establish such military post roads, and posts, as they may consider necessary."

His proposition that "at the most, by the Treaty of 1830, the United States only reserved a navigation easement on the Arkansas River" is not well-founded. Counsel states that the United States reserved an easement, *but this language can't be found,* and that the Choctaws acquired the navigable streams in the area *through a provision that is also missing.* It is quite obvious that if the United States had granted the navigable waters and had reserved a navigation easement that it would have been simpler to so state. On the contrary, the United States, being the grantor, did not need to reserve something that it did not grant; the easement was to the Choctaws, not to the United States.

In *Waddell,* the Court inquired into the character of one claiming under the British Crown. The Court said that the European possessions in America were not claimed by right of conquest but by right of discovery; according to the principles of international law as then understood by the civilized powers of Europe the Indian tribes in the new world were regarded as mere temporary occupants of the soil; and the absolute rights of property and dominion were held to belong to the discovering European Nation. Counsel for the Choctaws argues that this has little application, for

it was not intended by the United States under the terms of the treaties or the grants that it would reserve the bed of the navigable portion of the Arkansas River for the *benefit of a future state.* This is reasoning from a false premise for new states were in mind long before the treaties with the Cherokees and the Choctaws, as we show elsewhere in this brief.

4. *Patent issued to the Choctaws on March 23, 1842.*[7]

"The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of Country West of the Mississippi river in fee simple, to them and their descendants, *to inure to them while they shall exist as a Nation and live on it:*

"Beginning near Fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red river and down Red river to the west boundary of the territory of Arkansas; thence North along that line to the beginning." (Emphasis ours.)

The above italicized language is similar to that in the Cherokee patent, and it clearly indicates that the tenure of the grant was limited to the period of occupancy by the Choctaws as a nation.

With respect to the above patent and the language "Beginning near Fort Smith where the Arkansas boundary crosses the Arkansas river," Counsel for the Choctaws urges that "crosses" could only mean "crosses to the other side" of or the north bank of the Arkansas River. If so, why

[7]Appendix 5.

wasn't it so stated? The simple contradiction of this is found in the survey and we ask that the Court examine the surveys made under the direction of Isaac McCoy[8] and all of the other details indicating that the northeast corner of the Choctaw lands was at the south bank of the Arkansas river just north of the old fort.

Counsel for the Choctaws has argued that the boundary of the Choctaws extended to the north bank of the Arkansas under the Treaty of Doak's Stand. Any inconsistency which may exist between the Treaty of Doak's Stand and the Treaty of Dancing Rabbit Creek must be resolved by the latter treaty for it provides:

> *"And that this may be considered the treaty existing between the parties all other treaties heretofore existing and inconsistent with the provisions of this are hereby declared null and void."*

5. *Treaty with the Choctaws and Chickasaws of June 22, 1855, 11 Stat. L. 611.* This treaty provides for boundaries of the Choctaw and Chickasaw lands, a district for the Chickasaws and a district for the Choctaws, a common right of settlement by members of either tribe in either district, and many more provisions for the adjustment and readjustment of the relations between these two tribes. Of importance is Article 1:

> "The following shall constitute and remain the boundaries of the Choctaw and Chickasaw country, viz: *Beginning at a point on the Arkansas River, one hundred paces east of old Fort Smith, where the western boundary-line of the State of Arkansas crosses the*

[8]Appendices 3 and 4.

said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; *thence down said river to the place of beginning . . .*" (Emphasis ours.)

The beginning point is *on* the Arkansas River and not in the River or *on the opposite bank* from Fort Smith. The last call reads "down said river" and not down the middle of the river or the opposite bank. This seems to us the most reasonable interpretation of this description.

The history of the surveys of the lands of the Cherokees and Choctaws was very carefully traced by I. D. C. Atkins, the Commissioner of Indian Affairs in a letter dated May 11, 1886, addressed to the Secretary of the Interior and included as Cherokee's Appendix F. This is recommended to the Court's careful reading and we will not burden the Court with quotations except to point out some of the important parts. Without question, this letter is the most detailed account of the surveys written during this period. At page 12, the Commissioner recites from a report dated December 24, 1821, by Henry Downs, Commissioner of Indian Affairs, to the Secretary of War, regarding a survey of the eastern Choctaw boundary line:

"Sunday, 23rd, at 115 miles 10 chains and 50 links, the south bank of the Arkansas River, the corner post marked on the south side M. 115, 10 Chs., 50 links, on the west side C.N., on the east side U.S., distance from the *Cherokee corner on the north bank of the river*, one mile and thirty chains, Arkansas River 630 yards wide. October 4th started from a post on the south side

> of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas." (Emphasis ours.)

On page 13, the Commissioner notes that from the plat it appears that the northern terminus of the line of the eastern Choctaw boundary is at a point on the south bank of the Arkansas River, or in the channel of the river. He comments that the field notes cannot be found, so this is apparently the reason for his doubt as to whether this is at a point on the south bank of the Arkansas River or in the channel. There are other references to later surveys which were generally confusing to the officials of the Department and to the Indians. Although the Commissioner's prime purpose was to recommend the removal of the Cherokee Morgan from the lands south of the River, *he points out in considerable detail that all of the early surveys fixed the southeast corner of the Cherokees on the north side of the River and the northeast corner of the Choctaws on the south side of the River.* He finds that the passage of time and the movement of the River obliterated the earlier corners, and that in subsequent surveys, the surveyors had no little difficulty in determining this location. *We must emphasize here that the earlier surveys were the ones from which the patents were prepared.*

C. THE INTENTION EXPRESSED IN THE TREATIES AND PATENTS WAS TO PROVIDE FOR CONVEYANCE TO EACH OF PETITIONERS OF A GENERAL AREA OR A SPECIFIED QUANTITY OF LAND, AND EACH REFERENCE TO THE ARKANSAS RIVER WAS SOLELY AS A BOUNDARY, A MONUMENT OR A REFERENCE POINT.

There is no language whatsoever that shows that it was the intention to convey the fee title to the river bed between its high-water marks. Phrases such as "to the Arkansas River," "down the Arkansas," "thence down the main channel of the Arkansas," fall far short of evidencing a definite and specific intention to convey the entire bed of the Arkansas River between its high-water marks or any part thereof to the Cherokees or Choctaws.

The court below held that these phrases define no specific intent to convey. In their brief, at pages 39 and 40, the Cherokees attempt to refute this by a quotation from *State of Iowa* v. *State of Illinois*, 147 U.S. 1, 10 and 11, 37 L.Ed. 55 (1892). Counsel has omitted language from the quotation which is not only pertinent but gives a meaning to the quotation entirely different than that represented by counsel for Cherokees. The entire quotation is:

> "The Enabling Act of August 6, 1864 (9 Stat. at L. 56) under which Wisconsin adopted a constitution and became a state and was admitted into the Union, gives the western boundary of that state, after reaching the river St. Croix, as follows: 'Thence down the main channel of said river to the Mississippi, thence down the centre of the main channel of that' (Mississippi) 'river to the northwest corner of the state of Illinois.' The northwest corner of the state of Illinois must therefore be in the middle of the main channel of the river

> which forms a portion of its western boundary. *It is very evident that these terms, 'middle of the Mississippi river,' and 'middle of the main channel of the Mississippi river,' and 'the centre of the main channel of that river,' as thus used, are synonymous.*" (Emphasis ours.)

Thus, the Court did not say, as represented by counsel for Cherokees, that the terms "down the main channel" and "down the centre of the main channel" are synonymous.

Further, this Court did not follow the reasoning of the Supreme Court of Iowa, also quoted by counsel at page 40 of their brief, but instead stated:

> "The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring states, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each state equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the states of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each state extends to the thread of the stream, that is, to the 'mid-channel,' and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed."

This Court, therefore, held that the term "channel" referred to navigable waters, and not to the river bed containing normal high water. As counsel for the Cherokees points out, however, this was a case determining the *boundary between states which obtained* title to the beds of navigable rivers upon entering the Union, and not one wherein

this Court was determining the accuracy of the language of a grant, or the intent of the United States as to whether the lands underlying navigable waters were conveyed to the grantee prior to the admission of a state.

The claims of Petitioners are based on the premise that they became owners of the fee simple title to the lands ceded to them, and that in making the grants to them, the United States guaranteed that the areas would never be embraced by any state or territory. To this, the Cherokees would add that the grant to them was made as to a sovereign nation. In fact, the treaties and patents show that the grants *were qualified* with reverter to the United States if the tribes should cease to exist or to live upon the land, and it is submitted that both the Indians and the United States were concerned about imposition of state or territorial governments in which the Indians had no voice. We submit that statehood and citizenship for all the residents of the lands acquired by the United States from France was the avowed intention when these lands were first acquired, and this announced intention was ultimately accomplished with the consent of the people who resided there.

The obvious intent of the treaties and the patents was to grant and assure to the Indians a general area or specified quantity of land—in the case of the Cherokees, seven million acres of land plus certain additions; and in the case of the Choctaws, a large unmeasured territory. A review of the successive treaties reveals that references to the Arkansas River in the land descriptions were incidental to the primary intent. The Cherokee patent finally embodied a surveyed description, but it was issued pursuant to and in

fulfillment of the treaties. The Choctaw patent described the lands as did the treaties.

In contrast with the Indian treaty descriptions, consider the language used in a contemporary document—the description of the territory contained in the Act of Admission, approved March 6, 1820, 3 Stat. L. 545, for the admission of the State of Missouri into the Union. In that Act it was declared that the state should consist of the territory included within the following boundaries:

> "*Beginning in the middle of the Mississippi River,* on the parallel of thirty-six degrees of north latitude; thence west, along that parallel of latitude, to the St. Francis river; thence up and *following the course of that river, in the middle of the main channel thereof,* to the parallel of latitude thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through *the middle of the mouth of the Kansas river,* where the same empties into the Missouri river; thence from the point aforesaid, north, along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the river Des Moines, making the said line to correspond with the Indian boundary line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, *to the middle of the channel of the main fork of the said river Des Moines; thence down and along the middle of the main channel* of the said river Des Moines, to the mouth of the same, where it empties into the Mississippi river; thence due east *to the middle of the main channel of the Mississippi river;* thence down and following the course of the Mississippi river, *in the middle of the main channel thereof,* . . ." (Emphasis ours.)

If the middle of the river were intended, the middle of the river was described.

Our Appendices 6 and 7 are maps showing the Cherokee lands under the 1828 treaty and 1833 treaty, respectively. The land descriptions in these treaties are shown in detail on these maps, and the maps are essential to understanding the discussion immediately following.

The Treaty of July 8, 1817, with the Cherokees was made, in part, for the purpose of granting to certain of the Cherokees, lands in the West. This land, in what is now the State of Arkansas, was to be given in exchange "for a just portion of the country" which the Indians were to leave behind. The agreement of the United States was

> "to give to that part of the Cherokee Nation on the Arkansas as much land on said river and White River as they have or may hereafter receive from the Cherokee Nation east of the Mississippi, *acre for acre*, as a just proportion due that part of the Nation on the Arkansas agreeably to their numbers; which is *to commence on the north side of the Arkansas River*, at the mouth of Point Remove or Budwell's Old Place; thence by a straight line, northwardly, to strike Chataunga mountain, or the hill first above Shield's Ferry on White River, *running up and between said rivers for complement*, the banks of which rivers to be the lines . . ." (Emphasis ours.)

By the year 1828, there were so many non-Indians encroaching on the area that the original purpose of the grant was defeated. In the treaty of May 6, 1828, with the Cherokees, the United States agreed (Art. 2) to possess the Cherokees, and guarantee to them forever *seven million acres of land* bounded on the east by the western boundary of

Arkansas as defined in the 1825 treaty with the Choctaws. In this 1828 treaty, after one reasonably definite area was described, there was one indefinite area described, namely, that area "up and between said Rivers Arkansas and Canadian, to a point at which a line running North and South from River to River, *will give the aforesaid seven millions of acres.*" In the 3rd article of the treaty the United States agreed to have the lines of the above cession run without delay. See map, our Appendix 6.

In the treaty with the Western Cherokees under date of February 14, 1833, the description of the lands to be given the Cherokees was changed. Again, however, the guarantee to the Indians was the possession of *seven millions of acres of land,* together with "a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extended . . ." Again there was included an indefinitely bounded area, namely "up and between said south Osage line, extended west if necessary and a line drawn due west, from the point of beginning, to a certain distance west, at which, a line running north and south, from said Osage line, to said due west line, *will make seven millions of acres* within the whole described boundaries." (Emphasis ours.) See map, our Appendix 7.

The treaty of December 29, 1835, with the Cherokees confirmed the description of the lands contained in the treaty of February 14, 1833, with the Western Cherokees, and added to the lands an area estimated to contain 800,000 acres in what is now the southeast corner of Kansas.

With respect to the Cherokee lands, in a succession of treaties, the description of the lands to be ceded progressed from the agreement in 1817 to exchange "acre for acre," through agreements to grant seven million acres of land plus a western outlet, to a final patent in 1838 of 14,374,-135.14 acres for which specific boundaries were prescribed. It seems amply clear that the amount of acreage and its general location were the primary concern of the Cherokees.

Under the treaty of October 18, 1820 (Treaty of Doak's Stand), in consideration for the cession by the Choctaws to the United States of certain specified lands, the United States ceded to the Choctaws:

> "a tract of country west of the Mississippi River, situate *between the Arkansas and Red River*, and bounded as follows:—Beginning on the Arkansas River, where the lower boundary line of the Cherokees strikes the same; thence up the Arkansas to the Canadian fork, and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning."

The boundaries of this grant were to be ascertained and distinctly marked.

Note that in the foregoing description of the Choctaw lands, the phrase "where the lower boundary of the Cherokees strikes" the Arkansas River referred to the grant in 1817 to the Cherokees. That point was on the north bank of the Arkansas, but the Choctaw lands were clearly limited to those south of the Arkansas River.

By treaty of January 20, 1825 with the Choctaws, to fix the western boundary of Arkansas, the Choctaws ceded to the United States all that portion of lands granted to them by the Treaty of Doak's Stand which lay east of a line beginning on the Arkansas one hundred paces east of Fort Smith and running thence due south to Red River.

As has been noted, in the 1820 treaty, with the Choctaws, the western boundary of their land was designated as the source of the Canadian fork of the Arkansas River, running thence due south to the Red River. In the treaty of September 27, 1830, the indefinite westerly boundary of the Choctaw lands was again prescribed. The patent issued March 23, 1842, pursuant to the treaty, contained the same general and indefinite description of the lands.

It seems inconceivable that the Choctaws, in accepting a grant of millions of acres of lands described with such broad strokes of the brush, gave any thought to the Arkansas River except as a boundary after the initial designation in 1820 of "a tract of country west of the Mississippi River, situate between the Arkansas and Red River."

Viewed through the eyes of a drafter of legal descriptions, the land descriptions in the treaties, standing alone, actually exclude the river beds. This is graphically shown for the Cherokee treaties of 1828 and 1833 in the two maps, our Appendices 6 and 7.

The exact location of the Indian lands was uncertain, as may be seen.

"WAR DEPARTMENT, January 17, 1831

"Sir: I send you the enclosed map, which has been carefully prepared in reference to the various treaties which, at different times, have been concluded with the

Indians. To preserve quiet amongst them, it is important that each tribe should know the precise boundary of his country. The Government should run their lines, and have them plainly marked.

"The Cherokee treaty calls to run north with the Arkansas and Missouri western boundaries, until it crosses the Grand river of the Neosho. Now, where Grand river is situated we have no information, and, until it be ascertained, *it is impossible to tell how far west this tribe can claim between the Arkansas river and Canadian fork, along which they are to run to make their complement of seven millions of acres. The entire country of the Cherokee will require to be surveyed. Of the Choctaws only a part need be surveyed, as most of the cession to them has natural boundary.* A country also for the Creeks and Chickasaws should be surveyed: neither has been done.

"The distances and boundaries to be surveyed cannot be accurately computed; and hence no certain estimate of expense can be made for so remote a service, and in a country where supplies are scarce, and difficult to be had. I would suppose, however, that $10,000 might answer.

"I submit these things for your consideration, believing that your committee will perceive and admit their importance.

"Very respectfully, &c.,
"JOHN H. EATON.

"To the Hon. John Bell,
Ch. Com. Indian Affairs H.R.U.S." (Emphasis ours.)

On April 13, 1831, Mr. Eaton wrote to the Rev. Isaac McCoy, giving him instructions on the surveys of Indian lands which Mr. McCoy had been appointed to make. That letter reads in part, as follows:

"The first call of the treaty is to run north from Fort Smith, along the Arkansas and Missouri western boundary, until it cross the waters of the Grand river of the Neosho. Our maps do not show where Grand river is. There is a Grand river laid down, but this falls into the Missouri, and hence is not the stream intended by the treaty. This is a matter open to parole proof, and is to be settled in no other way. It will be incumbent on you, therefore, to obtain all the information you can as to the identity of this particular stream; and if nothing satisfactory can be obtained, you will proceed north until you cross the largest stream which runs into the Neosho, and designate that as your farthest northern boundary. The next course west, and the distance suggests no difficulty—the former Arkansas boundary, it is supposed, being a matter of notoriety.

"Having ascertained these two calls, and made your calculation of the number of acres contained, it will then become necessary that *you meander along the Arkansas and the Canadian fork, with a view correctly to determine how far it will be necessary to proceed up and between these two streams to make up the complement of 7,000,000 of acres secured to them by treaty.*" (Emphasis ours.)

Both letters are found in Document 512—Correspondence on the Subject of the Emigration of Indians, Vol. II, the first letter at page 266, the second commencing on page 275.

As previously noted, both the 1828 and 1833 treaties with the Cherokees left an open-ended area which could be determined only by survey of all the Cherokee lands.

In the description of the lands guaranteed to the Cherokees in the Treaty of May 6, 1828, the westerly boundary,

drawn from the north, strikes the Arkansas River, runs down the Arkansas River to its junction with the Canadian River, and *thence up and between the Arkansas and Canadian Rivers to an indefinite line.* This is a clear exclusion of that part of the Arkansas River which lies between lands guaranteed to the Cherokees.

However, by treaty of January 24, 1826 with the Creek Indians, the latter had been invited to select lands for settlement, and a portion of those lands upon which they settled was this same land between the Arkansas and the Canadian Rivers which the 1828 treaty guaranteed to the Cherokees. A settlement was made between the Creeks and the Cherokees, and the boundary line between them was fixed by treaties, each dated February 14, 1833. (Treaty with the Western Cherokee, 7 Stat. L. 414, II Kappler 385; Treaty with the Creeks, 7 Stat. L. 417, II Kappler 388). Lands to be given to the Cherokees were designated anew, with the boundary line between the Creek and Cherokee lands (part of the westerly boundary of the Cherokee lands) very specifically fixed. A surveyed line, or its equivalent, was used to define the westerly limit of the Cherokee lands in that area between the Canadian and the Arkansas Rivers. That portion of the Cherokee lands which was left with an indefinite western boundary was shifted to the area between two east-west lines, of which the north one was the south Osage line and the south one was a line running due west from point of beginning. The westerly line in this indeterminate area was specified to be one which *would make seven millions of acres* within the whole described boundaries. (See map, our Appendix 7.)

It may thus be seen that the westerly boundary of the Cherokee lands lying between the Canadian and Arkansas Rivers was not drawn with the intention of including any portion of the Arkansas River within the whole boundaries of the Cherokee lands. It was merely the settlement of a boundary line between the Creek and Cherokee lands. There was nothing in the circumstance of fixing this line that changes the designation of the Cherokee lands in this area as being "up and between the rivers."

Both the 1820 treaty and 1830 treaty, with the Choctaws, as well as the patent issued to the Choctaw Nation, define the western limit of the Choctaw lands as being the source of the Canadian fork of the Arkansas. The 1830 treaty added "if in the limits of the United States, or to those limits." This same wording was used in the patent. This is hardly the definitive wording that one expects in a deed of conveyance.

We submit that the only clear intent of these land descriptions is, for the Cherokees, the grant of a specified amount of acreage (not river bed) and, for the Choctaws, a vast area running from the Arkansas territorial boundary to the western limits of the United States between the Red River and the Canadian fork of the Arkansas.

Ownership of rivers and river beds was left to be determined under basic principles of law. Many hundreds of miles of the beds of non-navigable streams were ceded to Petitioners. The navigable portion of the Arkansas River was retained by the United States and was vested in Oklahoma at statehood.

III

AT THE TIME OF THE TREATIES THERE WERE SPECIFIC AND COMPELLING REASONS FOR RETENTION BY THE UNITED STATES OF TITLE TO THE NAVIGABLE PORTION OF THE ARKANSAS RIVER BED, APART FROM POLICIES COMMON TO ALL NAVIGABLE WATERS.

Petitioners attempt to lend support to their principal contention—that the "implied trust-equal footing" doctrine is here inapplicable because at the time of the relevant treaties and patents the United States affirmatively intended that the granted lands would never be included within any future territory or state, a proposition squarely refuted in Section IV below—by arguing also that there was then no conceivable reason for retention of title to the river bed by the United States.

This argument will not survive analysis.

Quite apart from the "implied trust-equal footing" doctrine which was applicable to all navigable waters, and specifically with respect to the Arkansas River, at the time of the treaties there were at least these compelling reasons for retention of title by the United States:

1. The acquisition of full control and use of the Mississippi River ". . . *and all the streams that enter into it, from their sources to the ocean* . . .,"[9] was one of the paramount reasons for the negotiations culminating in the Louisiana Purchase in 1803.

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[9]Letter dated May 13, 1803, from Robert Livingston and James Monroe to James Madison, State Papers and Correspondence Relating to the Purchase of The Louisiana Territory, U.S. Government Printing Office, 1903.

The vital public importance of the tributaries of the Mississippi River had been a preoccupation of our founding fathers:

> "To preserve the national character of *all the rivers leading into the Mississippi* and St. Lawrence and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787, declaring them to be free to the public; and so important was the provisions of this Ordinance deemed by Congress that it was imposed on Wisconsin as a condition of admission into the Union." *U. S.* v. *The Montello, etc.*, 87 U.S. 430, 22 L.Ed. 391, 395, 20 Wall. 430 (1874). (Emphasis ours.) Journals of The Continental Congress 1774-1789, Vol. XXXII (1787), G.P.O. 1936, pages 314, 319.

Further, valuable minerals were thought by early explorers to exist all along the Arkansas—a possibility still unresolved at the time of the treaties and patents here at issue, and a hopeful development of which Congress was fully aware.

In the debate on the Act Erecting Louisiana Into Two Territories and Providing for the Temporary Government Thereof (Act of March 26, 1804, 2 Stat. L. 283), Congressman Samuel L. Mitchill from the Committee of Commerce and Manufacturers reported:

> "The Arkansas, which has already been traced above one thousand miles, also seems worthy of being explored with more care into a greater extent than has hitherto been done. A spacious plain and valley encrusted annually (like the soil in some spots about the Persian Gulf) with native salt, in quantities sufficient to impregnate a branch of the Arkansas, and occasionally the river into which it falls, with its briney quality, and to make it a salt river down to the settle-

ment of Ouisarque for considerably more than 600 miles of its course, might be mentioned as no ordinary occurrences. *That masses of virgin silver and gold glitter in the veins of the rocks which underlay the Arkansas itself and mingle with the minerals near certain other of its streams,* and offer themselves to the hand of him who will gather, refine, and convert them to use, are no less uncommon and wonderful. These extraordinary productions might be dwelled upon at considerable length, in this report; *but, credible as both the relations are, the committee forebear to offer anything more than that the existence of a salt river, precious mines and ores, and of some other remarkable objects are stated upon solid and credible testimony.* Omitting these things, it is not necessary to be urged to Congress, the Committee considered that the latitude, longitude and relative situation of the source of the Arkansas, are themselves of sufficient moment to render their attainment very desirable." (8th Congress, 1st Session, Annals of Congress, pages 1124, *et seq.*) (Emphasis ours.)

Clearly, a grant by the United States to any Indian tribe or tribes of a national asset of such value and importance should not be lightly inferred.

In addition, the Arkansas River was even then an important avenue of commerce and communication.

For several years *prior* to the grants to the Cherokees and Choctaws and for more than eighty years thereafter, traffic on the Arkansas River through what is now Oklahoma was an avenue over which men traveled and trade was extended. Many rivers served the area, but the greatest of these was the Arkansas.

The river traversed the eastern side of the Rockies, from Colorado, across Kansas, Indian Territory, and Ar-

kansas Territory. Connecting with this river were the Grand, the Verdigris, the Canadian, and numerous smaller streams. After crossing Arkansas Territory, the Arkansas River emptied into the Mississippi River a little north of what is now Greenville, Mississippi, going through Fort Smith, Van Buren, Little Rock, Pine Bluff, and other cities and towns in Arkansas Territory. At the mouth of the Arkansas River was Napoleon. Fort Smith was 548 miles from the mouth of the river. Fort Gibson, near the point of the confluence of the Grand River with the Arkansas, was 135 miles upstream from Fort Smith.

History records river boat navigation on the Arkansas River in the Indian Territory as early as 1822, when the boat "Eagle" brought cargo from New Orleans. In 1826 the boat "Spartan" carried cargo to Choteau's trading post, which was upstream from the mouth of the Grand (or Neosho) River. In 1828 the "Facility" carried 117 tons of merchandise and Creek emigrants to the Creek Agency, and returned to New Orleans with a cargo of 500 barrels of pecans. In 1829 the "James O'Hara," a 200-ton steamer, carried recruits for Fort Gibson, and 100 Cherokee emigrants. In 1833 seventeen boats regularly docked at Fort Gibson. There were then twenty-two established landings between Fort Smith and Fort Gibson, including Redland, Sallisaw, Webber's Falls and Vian.[10]

This actual navigation upon the Arkansas River continued from 1822 down through the advent of statehood. Thus, the Arkansas River was not only *an* important artery

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[10]Grant Foreman, *Muskogee and Eastern Oklahoma;* S. T. Abert's survey, Ex. Doc. No. 295, 41st Congress, 2d Sess.

of commerce at the time of the grants and thereafter, but probably served as *the* most important artery of commerce for this area for a half century, from 1822 to 1872, when the railroads entered the Indian Territory.

Again, as noted earlier, the trial court below took judicial notice of this fact.

> "It is the conclusion of the court as to this issue, arrived at from documents, records, reports, and articles made and filed or published contemporaneously with the pertinent times, and from published books and research material written by students of the area and the period, all of which are as readily available to the court as to the parties, that it was common knowledge in the legal sense that from at least as early as 1824 until sometime after November 16, 1907, the Arkansas River in its natural state was a navigable river below its confluence with the Grand River, *regularly used throughout the remainder of its course in what is now Oklahoma as a highway of commerce during the major portion of each year.*" (Pre-Trial Order filed September 25, 1967). (Emphasis ours.) Joint Appendix 113a.

In short, it is simply not credible, so recently after the hard negotiations in Paris, that one of the most sought-after goals of the United States, a principal tributary of the Mississippi, and a tributary still largely unexplored and unevaluated, would have been granted (in the total absence of any demand for the river by either the Cherokees or the Choctaws, and hence in the total absence of any "public exigency") without, in the stern language of *Holt State Bank*, an expression in *some* law, *some* treaty, or *some* patent in which ". . . the intention was definitely declared or otherwise made very plain."

2. The lands granted the Cherokees and the Choctaws and Chickasaws, although extremely substantial (collectively constituting most of what is now the eastern half of Oklahoma), nevertheless represented only a small portion of the vast Louisiana Purchase lands lying west of the Mississippi River. The Arkansas River coursed from the Mississippi through the State of Arkansas, through the Indian treaty lands, *and beyond,* into areas in which, as noted, some thirty-odd other Indian tribes had been relocated, and even further, into the territory north and west from which many future states would later be carved, ". . . range after range, . . ." as President Jefferson had predicted. The full extent of the navigability of the Arkansas was not then known, and it is historically unreasonable to assume that the United States would, by mere inference, and without demand, divest itself of title to this potentially important thoroughfare to its vast western lands.

3. The United States, in its treaty making with the Indians, retained, because it could not constitutionally divest itself, of two important responsibilities: that of regulating commerce between the Indians and the United States, and that of preserving the peace and protecting the boundaries not only between the Indian lands and the United States, but *the boundaries between Indian Nations as well.*[11] For these purposes, after the relocation of the Indians, United States military establishments were maintained at Fort Smith and Fort Gibson, *both served by the Arkansas River, the boundary between the Cherokees on the north bank, and the Choctaws and Chickasaws on the south bank.* The river was the supply route from the east

[11]House Report No. 474, 23rd Cong., 1st Session (1834), page 17.

to Fort Gibson, in Cherokee territory, and the communications link between the two garrisons. Regardless of the river's potential importance as an avenue to the great expanse of United States territory to the north and west, and regardless of potential mineral wealth in the river, for this reason alone it is inconceivable that the United States would have divested itself of ownership of its lifeline to Fort Gibson, a lifeline which in itself was also a boundary upon which the United States was obliged both to regulate commerce and maintain the peace. This conclusion is supported by the express language of the 1830 Choctaw Treaty of Dancing Rabbit Creek which not only provided for the establishment of such military posts in Choctaw territory as the United States might deem necessary, but which also stated that "Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the United States," an odd provision, indeed, if the navigable Arkansas river bed had been granted to the Choctaws.

To those representatives of the United States involved in the negotiations with the Indians in the early 19th Century, the foregoing urgent practical considerations would certainly suggest the prudence of the retention of the navigable portion of the Arkansas River by the United States. More to the point here, and quite apart from the possibility of future states, these critical factors not only negate any "public exigency" or "compelling public purpose" for the (inferential) granting of the river by the United States, but beyond that, establish a manifest public need for the river's retention. *A fortiori*, in the language of *Holt State Bank*, its conveyance cannot be presumed in the absence of a definitely declared intent, expressed in plain language,

which is entirely absent in any relevant law, treaty, or patent here.

IV

THE PROVISIONS IN THE TREATIES THAT THE LANDS CEDED TO EACH OF PETITIONERS WOULD NOT, WITHOUT THEIR CONSENT, BE INCLUDED WITHIN THE LIMITS OF ANY TERRITORY OR STATE, WERE NOT INCONSISTENT WITH THE POLICIES, POWERS, AND RIGHTS OF THE UNITED STATES TO FORM A STATE FROM AN AREA WHICH INCLUDED THE LANDS CEDED TO PETITIONERS.

Petitioners and *amici curiae* voluminously argue that the main premise of the "implied trust-equal footing" doctrine—the possibility, however remote, of a future state—is missing here. They argue that this is so because the United States in its negotiations with the Indians and in its consequent treaties and patents, allegedly repeatedly and expressly disavowed any intention ever to include any lands within the boundaries of the Indian grants in a territory or a state.

At the outset it should be noted that with respect to most of the river bed here in dispute, Petitioners' argument is moot, for as is clearly shown elsewhere in this brief that part of the Arkansas river bed which divided the Cherokee and Choctaw lands was *not* "within the boundaries" of such lands, but on the contrary *constituted* the boundary, the lands of each Nation ending at the high water mark on its respective river bank or banks.

But even assuming, *arguendo*, that the disputed portion of the river lay entirely within the treaty lands, Petitioners' contention is without merit.

Despite the Petitioners' selective quotations from contemporaneous documents, the United States always contemplated not only the possibility, but much more, the hope that a future state might evolve from the relocated Indian Nations. Beyond that, however, by the very nature of the parties involved, the sovereign United States, whatever the language of the treaties with the less-than-fully-sovereign Indian Nations, and however worded the patents, always possessed the right and the power to admit to the Union a state embracing the Indian treaty lands, a legal circumstance not only fully appreciated at the time by representatives of the United States, but by the Indians as well.

In 1834, but four years after the Choctaw Treaty of Dancing Rabbit Creek and one year before the Cherokee Treaty of New Echota, the Committee on Indian Affairs of the House of Representatives, after extensive hearings, favorably reported a bill to establish a "Western Territory" stretching from Mexico (Texas) in the south to the Missouri and Platte Rivers in the north, and from the western borders of Arkansas and Missouri in the east to Mexican possessions in the west, such territory to be established for and inhabited and controlled by ". . . the emigrant and other Indian tribes therein." The bill did not pass, but the detailed accompanying report is illuminative.

> "Whatever difference of opinion may have heretofore existed, *the policy of the Government, in regard to the future condition of these tribes of Indians, may now be regarded as definitely settled.* To induce them to remove west of the Mississippi, to a territory set apart and dedicated to their use and Government forever; to secure to them there a final home; to elevate their intellectual, moral, and civil condition, and to fit them

for the enjoyment of the blessings of a free Government, is that policy. *And a further hope is now encouraged, that whenever their advance in civilization should warrant the measure, and they desire it, that they may be admitted as a State to become a member of the Union.*

"To carry that policy into effect is the object of this bill." (Emphasis ours.) House Report No. 474, 23rd Congress, 1st Session, page 14.

As an interim measure, the 1834 bill first proposed an Indian delegate to Congress, and in this connection, the committee report stated:

"The proposition for allowing Indians a delegate is not now for the first time brought forward.

"It was first suggested in 1778, and in the first treaty ever formed by the United States with any Indian tribe. The treaty with the Delawares of the 17th September, 1778, contains the following article: 'And it is further agreed on, by the contracting parties, (should it, for the future, be found conducive for the interests of both parties) to invite any other tribes who have been friends to the interests of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representative in Congress: Provided, Nothing contained in this article is to be considered as conclusive until it meets with the approbation of Congress.'

"In the treaty of Hopewell, of 1785, is the following article: 'Article 12. That the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress.'

"*In the treaty with the Choctaws, of September, 1830, they requested the privilege of having a delegate in the House of Representatives;* and the treaty states that 'the commissioners do not feel that they can, under a treaty stipulation, accede to the requests, but at their desire present it in the treaty, that Congress may consider of and decide the application.' " (Emphasis ours.) House Report No. 474, 23rd Congress, 1st Session, pages 21-22.

Bills similar to the 1834 effort were introduced in 1836, 1845, and 1848, but each time again failed in passage. In 1848, the then Committee on Indian Affairs held lengthy hearings and its report dated June 27, 1848, and Numbered 736, reiterated that the United States' policy was, and had been since as early as 1778, to establish a confederation of Indian tribes which would one day become a state. In this report, as in the 1834 report, the Cherokees and Choctaws were specifically mentioned. House Report No. 736 of 1848 constitutes what is probably the most revealing, while still concise, history of the United States' policy with respect both to representation of the Indians in Congress and of the creation of an Indian State, from the time of Independence to and beyond the time of the treaties here at issue, and is included in its entirety as Appendix 8 to this brief.

Nor were the Indians unaware of this long established United States' policy. The Choctaws' 1830 demand for a delegate to Congress has been referred to in the 1834 House Report. In addition, Commissioner Schermerhorn, who signed for the United States in the Treaty of New Echota, made it unmistakable to the Cherokees:

"I do not advise you to remove merely to get rid of your difficulties and the deadly influence by which

> you were surrounded, but I look forward with confidence to the day when your several tribes of Indians shall there be organized into a territorial government, with the rights and privileges of American citizens; *and that the time will yet come, when an Indian State will be added to our Federal Union;* and which, though the last, will be the brightest star and fairest stripe upon the banner of our nation, and fill up the measure of our country's glory." (Emphasis ours.) Papers and Correspondence on the Removal of Cherokees (1835-37); U. S. Department of Interior Library, E99 C5 U5.

The numerous statements made by United States representatives to the Indians, or included in the treaties or patents, quoted by Petitioners to the effect that the Indians would in their new lands never be subject to the jurisdiction of a territory or a state, can only be understood against the background of the increasingly abrasive cohabitation by (subject) Indians and (governing) whites in the *existing* Southern States prior to removal. The most attractive arguments for removal available to the United States, which sought to avoid the necessity of using force of arms, was, to the Cherokees, that their Nation would no longer be subject to the laws of the State of Georgia; and, to the Choctaws, that they would be freed from the repressive and restrictive controls of the State of Mississippi. The Indians were thus assured, and honestly so, a) that no then *existing* state would ever assert its jurisdiction over their new western lands, *and none ever has;* and b) that the Indians' lands would never be included in a new state without their consent, *and they never were,* for both Nations relinquished tribal sovereignty prior to Oklahoma statehood pursuant to formal agreements with the United States. As explained by the Court of Appeals, below:

"In 1893, Congress created a commission to negotiate with the Cherokees, the Choctaws, and other tribes for the extinguishment of the tribal titles to land, and the allotment of land to the individual members of the tribes. The result was an agreement with the Cherokees and with the Choctaws which nullified treaties inconsistent therewith and which provided for the allotment of the lands. These agreements were followed by the Act of April 26, 1906, 34 Stat. L. 137, which provided for final disposition of the affairs of the Five Civilized Tribes. This Act required that lands belonging to the tribes on their dissolution shall be held by the United States in trust for the use and benefit of the Indians." Joint Appendix 131a, 136a.

In this connection, The Cherokee Nation urges that simply because the New Echota Treaty declared that the Cherokee lands would never be included in any state or territory without the consent of the Cherokee Nation, the possibility of a future state was *ipso facto* legally precluded insofar as the applicability of the "equal footing" doctrine is concerned. The Choctaw and Chickasaw Nations make the same argument based on language in the Treaty of Dancing Rabbit Creek, which stated more simply that Choctaw land would never be embraced in any territory or state, but which was obviously equally susceptible to later amendment by agreement of the Indians whether it said so or not. These arguments entirely miss the point: *no new state ever has, or ever can be admitted to the Union without the consent of the people who seek admission.*

Under Article IV, Section 3, Clause 1, of the United States Constitution, the power of Congress is limited to the admission, not the formation, of new states. The customary

procedure has been the submission to Congress of a constitution agreed to by the people of the territory seeking admission, frequently in pursuance of prior congressional authorization in the form of an enabling act, and congressional assent to the proposals therein received from the applying territory. In other words, the consent of the people in the territory obtained through majority vote has always been required for admission of the new state, and language reflecting the necessity of such consent in the case of the Indian territories can hardly be used as evidence that the United States intended that no future state would ever, under any circumstances, there be created.

But apart from the clearly perceived possibility of a future Indian state, and equally consistent with all statements made to, all treaties made with, and all patents granted the Indians, another contingency was provided for, which if it occurred, would wholly eliminate the Indians' possessory title to the treaty lands which would then revert to their original status: *the grants to both Nations were conditional,* reflecting the obvious expectation of the United States that the establishment of the respective Indian Nations in their new locations might be merely temporary.

The Choctaw patent begins:

> "The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River in fee simple, to them and their descendants, *to inure to them while they shall exist as a nation and live on it . . .*" (Emphasis ours.) Our Appendix 5.

Similarly, the Cherokee patent concludes:

"TO HAVE AND TO HOLD THE SAME, together with all the rights, privileges and appurtenances thereunto belonging, to the said CHEROKEE NATION FOREVER, subject . . . and subject also to the condition provided by the Act of Congress of the 28th of May, 1830, referred to in the above recited third article, and which condition is that *the lands hereby granted shall revert to the United States if the Cherokee Nation ceases and abandons the same . . .*" (Emphasis ours.) Our Appendix 9.

Thus, on the face of the grants it is apparent that the United States retained residual title to all lands granted and that it consequently cannot be said *as a matter of law*, that the treaties and grants taken together conclusively preclude the possibility that future states were contemplated in the territories conveyed to the Indian Nations. This being so, the "implied trust-equal footing" doctrine enunciated in *Pollard* v. *Hagan* and elaborated in *Shively* v. *Bowlby* is just as applicable to the lands which later became the State of Oklahoma as it was, in *Holt State Bank*, to those from which the State of Minnesota was formed.

Finally, it is with respect to what really is the main thrust of Petitioners' argument—that (their interpretation of) the treaties and patents involved here preclude the possibility of a future state *as a matter of law*—that it becomes necessary to take a realistic look at the status of the "treaties" as obligations of the United States, and at the status of the Cherokees and the Choctaws as autonomous political bodies.

First, "Such treaties are not contracts and confer no vested rights upon the tribes which are within the protec-

tion of the Constitution. They are effective not as treaties, but as acts of Congress and do not impair the power of Congress to further legislate on the same subject matter, even in violation of the terms of the treaties. Whatever may be the moral obligation to keep inviolate the treaties entered into with the Indian tribes, the sovereignty of the United States cannot be concluded by its own legislative enactments, should occasion arise for the further exercise of its authority (citing, *inter alia*, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 47 L.Ed. 299 (1902)." Mills, Oklahoma Indian Land Laws, Thomas Law Book Co., 2d Ed., 1924, Ch. II, Sec. 6, p. 16. We include as our Appendix 10 a copy of Chapter 2 of this highly respected authority which places a suitable perspective on the legal status of the treaties cited by Petitioners.

Second, neither the Cherokees nor the Choctaws have full legal autonomy and their status has a most limited and restricted nature. They have been described by the United States Supreme Court not as "foreign nations," but as "domestic dependent nations . . . (whose) relation to the United States resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L.Ed. 296 (1831). See also Federal Indian Law, United States Department of the Interior, 1958, Chapter VI, Section B, "The Legal Status of Indian Tribes," pages 454, *et seq.*

For these reasons, whatever the language utilized, it cannot be doubted that the United States always had the *power* to establish a future state which included the Indian lands, and that the United States, and the Indians, also, well knew this power existed.

This power was, in fact, discussed directly with the Cherokees during the treaty negotiations. In a letter from Elias Boudinot to John Ross, Chief of the Cherokees, dated November 25, 1836, Boudinot stated:

> "According to the treaty, in no future time is a territorial government to be formed over these lands without the consent of the Cherokees. From these plain provisions you build an argument to show that the Indian title is subject, not only to Act of May, 1830, and to similar acts, but to other acts which may hereafter be made, and that if the government should see fit to organize a territory over the Cherokee country, the nation will become legally extinct, and the lands will revert to the United States and hence the title pretended to be given in the treaty is good for nothing. *This no doubt is conclusive reasoning from the premises.*" (Emphasis ours.) Senate Document No. 281, 52nd Congress, 1st Session.

As noted earlier, this acknowledged power was never exercised, the agreement of both Petitioners to tribal dissolution having been obtained prior to Oklahoma statehood, but it was always there, and it is enough alone to negate any contention that the possibility of a future state was legally precluded by the instant treaties and patents upon their execution.

It is obvious, on the contrary, that in any of four clearly foreseen situations it was understood both by the United States and by the Indians that the treaty lands might be included in a future state:

1. With the consent of the Indians (which in fact occurred); or,
2. Following the abandonment of the treaty lands by the Indians; or,

3. Following the extinction of the Indian Nations; or,

4. Upon exercise of the abrogative powers of the United States vis-a-vis its "domestic dependent wards."

When it is remembered that the "implied trust-equal footing" doctrine was not a mere presumption of law established in 1845, but had been, as this Court in Pollard v. Hagen stated in that year, the consistent policy of the United States since Independence, the retention of title by the United States to the already valuable, and potentially invaluable Arkansas river bed, in the total absence of any "public exigency" requiring its divestiture, was consequently not only consonant with the then United States policy but dictated by it. The fact of retention is manifest by the absence of any language, in any instrument, in which an intention to divest ". . . was definitely declared or otherwise made very plain."

CONCLUSION

In our argument we have demonstrated that:

1. The State of Oklahoma acquired title to the bed of the navigable portions of the Arkansas River when it became a State in 1907.

The United States acquired the area that became Oklahoma as a part of the Louisiana Purchase in 1803, and with respect to that area the United States has consistently maintained its general policy of retaining title to the navigable river beds for the benefit of future States. When Oklahoma was admitted as a State it was admitted on an

equal footing with the original States and acquired title to the Arkansas river bed between its confluence with the Grand River and the State line of Arkansas. The United States did not convey this portion of the Arkansas river bed to the Cherokees or to the Choctaws in the treaties with them or the patents to them. Since there was no plain or definite conveyance to either of them, there was no need for the United States expressly to reserve the river bed. The fact that part of the navigable portion of the river ran through lands conveyed to the Cherokees and the remainder lay between the lands conveyed to the Cherokees and to the Choctaws was not material in view of the fact that the United States did not definitely and expressly convey it to either of them.

2. Neither the treaties nor the patents provide for the conveyance of the Arkansas river bed to the Cherokees or to the Choctaws. The river is mentioned in these documents only as a boundary, a monument, or a reference point.

3. The Arkansas River was important to the United States because it was a vital public thoroughfare to and through these Indian treaty lands to other portions of the Louisiana Purchase; because of its potential mineral deposits; because it was a boundary between the Cherokees and Choctaws upon which the United States was bound to maintain the peace and regulate commerce; and because it served as the principal lifeline to the United States' major military garrison in Indian Territory. In the total absence of any demand for the river by either the Cherokees or the Choctaws, it is beyond reason to suppose that the United States would have voluntarily divested itself of title to this critical navigable stream.

4. No conveyance of the river bed may be inferred from the facts. Assuming, *arguendo*, however, that some relevance may be attributed to the provisions in the treaties that the lands ceded to Petitioners were not to be included in a future State without their consent, these provisions must then be construed both in view of the then policy of the United States, and the unquestionable power of the United States to include the lands ceded to Petitioners in a State at some time in the future. Moreover, prior to admission of Oklahoma as a State, the United States secured the consent of Petitioners to relinquishment of tribal ownership of the lands and to allotment of the lands to the individual tribal members and to United States Citizenship for the tribal members. As citizens they voted on the question of admission of Oklahoma to the Union.

The judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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SEPTEMBER, 1969

APPENDIX

APPENDIX 1 Letter dated August 12, 1803, from President Jefferson to John Breckenridge, State Papers and Correspondence bearing upon the Purchase of the Territory of Louisiana, Pages 233-235, inclusive.

probability of success, which continued to increase till the object was accomplished.

It cannot be doubted that there were a variety of causes, which contributed to produce a change in the mind of the first Consul relative to Louisiana, & to facilitate the cession which I flatter myself our government has been fortunate in obtaining. Among these may be calculated the failure of the Expedition to St. Domingo, the pressure of the crisis in Europe &c. There are occasions which it is fair and honorable for every government to take advantage of & which none fail to do, when those at their head have discernment enough to see them. They are such as our distance from Europe, & fortunate situation in other respects, will I hope always furnish us, when they may be necessary. I affirm, however, with perfect confidence in the opinion, that notwithstanding these favorable circumstances, we should not have succeeded had the amiable relations between America & France been broken, or had the President have taken an attitude of menace towards that power, or any other than precisely that which he did take.

Extract of a letter from James Monroe, esq., Minister Plenipotentiary, London, to the Secretary of State.

AUGUST 15, 1803.

The enclosed, which I received last night from Paris by an American gentleman, containing important information, is, therefore, transmitted to you.

[Extract of a letter from Mr. Pemwick to Mr. Monroe.]

PARIS, *August 5, 1803.*

Since you left this city nothing very material has transpired. I know, however, from a faithful source, that the Spanish Government has made the most serious remonstrances against the cession of Louisiana, and their instructions here are to prevent its being carried into execution, if yet possible: and if pecuniary arguments could succeed, the hands of their Ministers are not tied on that score. This might be a useful hint, if our Senate should not disregard federal examples in modifying treaties, as it is now well understood, that, if any conditional clause of ratification should be introduced by the United States, this Government would profit of the circumstance to annul the whole work.

President Jefferson to Mr. Breckenridge.

MONTICELLO, *August 12, 1803.*

DEAR SIR,—The enclosed letter, though directed to you, was intended to me also, and was left open with a request, that when forwarded, I

would forward it to you. It gives me occasion to write a word to you on the subject of Louisiana, which being a new one, an interchange of sentiments may produce correct ideas before we are to act on them.

Our information as to the country is very incomplete; we have taken measures to obtain it full as to the settled part, which I hope to receive in time for Congress. The boundaries, which I deem not admitting question, are the high lands on the western side of the Mississippi enclosing all its waters, the Missouri of course, and terminating in the line drawn from the northwestern point of the Lake of the Woods to the nearest source of the Mississippi, as lately settled between Great Britain and the United States. We have some claims, to extend on the seacoast westwardly to the Rio Norte or Bravo, and better, to go eastwardly to the Rio Perdido, between Mobile and Pensacola, the ancient boundary of Louisiana. These claims will be a subject of negotiation with Spain, and if, as soon as she is at war, we push them strongly with one hand, holding out a price in the other, we shall certainly obtain the Floridas, and all in good time. In the meanwhile, without waiting for permission, we shall enter into the exercise of the natural right we have always insisted on with Spain, to-wit, that of a nation holding the upper part of streams, having a right of innocent passage through them to the ocean. We shall prepare her to see us practice on this, and she will not oppose it by force.

Objections are raising to the eastward against the vast extent of our boundaries, and propositions are made to exchange Louisiana, or a part of it, for the Floridas. But, as I have said, we shall get the Floridas without, and I would not give one inch of the waters of the Mississippi to any nation, because I see in a light very important to our peace the exclusive right to its navigation, and the admission of no nation into it, but as into the Potomac or Delaware, with our consent and under our police. These federalists see in this acquisition the formation of a new confederacy, embracing all the waters of the Mississippi, on both sides of it, and a separation of its eastern waters from us. These combinations depend on so many circumstances which we can not foresee, that I place little reliance on them. We have seldom seen neighborhood produce affection among nations. The reverse is almost the universal truth. Besides, if it should become the great interest of those nations to separate from this, if their happiness should depend on it so strongly as to induce them to go through that convulsion, why should the Atlantic States dread it? But especially why should we, their present inhabitants, take side in such a question? When I view the Atlantic States, procuring for those on the eastern waters of the Mississippi friendly instead of hostile neighbors on its western waters, I do not view it as an Englishman would the procuring future blessings for the French nation, with whom he has no relations of blood or affection. The future inhabitants of the Atlantic and Mis-

sissippi States will be our sons. We leave them in distinct but bordering establishments. We think we see their happiness in their union, and we wish it. Events may prove it otherwise; and if they see their interest in separation, why should we take side with our Atlantic rather than our Mississippi descendants? It is the elder and the younger son differing. God bless them both, and keep them in union, if it be for their good, but separate them, if it be better. The inhabited part of Louisiana, from Point Coupée to the sea, will of course be immediately a territorial government, and soon a State. But above that, the best use we can make of the country for some time, will be to give establishments in it to the Indians on the east side of the Mississippi, in exchange for their present country, and open land offices in the last, and thus make this acquisition the means of filling up the eastern side, instead of drawing off its population. When we shall be full on this side, we may lay off a range of States on the western bank from the head to the mouth, and so, range after range, advancing compactly as we multiply.

This treaty must of course be laid before both Houses, because both have important functions to exercise respecting it. They, I presume, will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to *the nation* for an additional article to the Constitution, approving and confirming an act which the nation had not previously authorized. The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify and pay for it, and throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian investing the money of his ward in purchasing an important adjacent territory: and saying to him when of age, I did this for your good; I pretend to no right to bind you: you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines.

[Extract.]

President Jefferson to Mr. Madison.

MONTICELLO, *August 25, 1803.*

I suppose Monroe will touch on the limits of Louisiana only incidentally, inasmuch as its extension to Perdido curtails Florida, and

APPENDIX 2 Letter dated March 26, 1908, from C. F. Larrabee, Acing Commissioner of Indian Affairs, to the Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,

I.T. 20634-1908. OFFICE OF INDIAN AFFAIRS,

WASHINGTON.

RHM-

Subject:
Purchase of sand and gravel by Lowerre Rucker Company from bed of Arkansas River.

The Honorable,

The Secretary of the Interior.

Sir:

I have the honor to invite your attention to the enclosed letter of March 2 from J. G. Wright, Commissioner of the Five Civilized Tribes, submitting communication of the 13 from the United States Indian Agent, Union Agency, relative to an application made on August 30, 1907, by the Lowerre Company for permission to enter into a contract for the of sand and gravel from the Arkansas River of the of the Cherokee Nation. Mr. Wright quotes the re porting that a representative of the Lowerre Rucker called at his office and said that practically no gravel been taken out of the river prior to November when the Indian Territory became incorporated as a part State of Oklahoma, that it was the opinion of that the title to the bed of the river had passed from the Cherokee Nation to the State of Oklahoma, and for this reason the company did not think it proper to enter into contract to pay royalties to the Cherokee

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from a river situated in the State of Oklahoma.

The Commissioner says that there are in existence other contracts for the taking of sand and gravel from the Arkansas River, which the War Department has held to be a navigable stream, and that all the parties to such contracts are contending that from and after November 16, 1907, when Indian Territory became a part of the State of Oklahoma, neither the Cherokee Nation nor the Department of the Interior had further jurisdiction in the matter, and that they should be required to pay royalty on sand and gravel taken from the bed of any navigable stream. Commissioner Wright asks for instructions.

In the case of Shively vs. Bowlby (152 U. S. 1) the Supreme Court very thoroughly discusses the question of [illegible] title to and rights from certain of its grants [illegible]

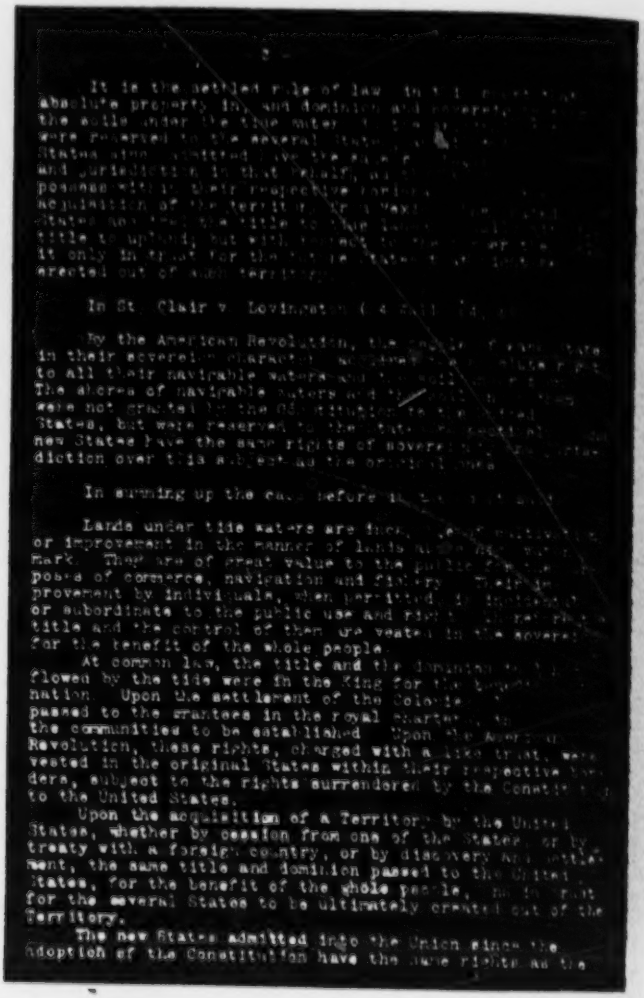
The following is cited:

In the case of Weber v. Harbor Commissioners (18 Wall [illegible] involving the question of ownership of lands below [illegible] Francisco:

Although the title to the soil under the tide waters within the boundaries of the United States is vested in the several States, subject to the title to the soil, the title in trust for the future States. Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as the State may deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation may be affected by the laws of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."

The case of Knight v. United States Land Association, (142 U. S. 183).

[APPENDIX]



It is the settled rule of law in t[illegible] absolute property in, and dominion and [illegible] the soils under the tide waters [illegible] were reserved to the several [illegible] States since admitted have the same [illegible] and jurisdiction in that behalf, and [illegible] possess within their respective [illegible] acquisition of the territory [illegible] States and to the title to [illegible] title to uphold, but with regard [illegible] it only in trust for the future States [illegible] erected out of such territory.

In St. Clair v. Lovingston ([illegible]

By the American Revolution, the [illegible] State in their sovereign character, acquired [illegible] to all their navigable waters and [illegible] The shores of navigable waters and [illegible] were not granted by the Constitution [illegible] States, but were reserved to the States respectively. The new States have the same rights of sovereignty [illegible] diction over this subject as the original [illegible]

In summing up the cases before [illegible]

Lands under tide waters are [illegible] or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. The ultimate title and the control of them are vested in the sovereign for the benefit of the whole people.

At common law, the title and the dominion [illegible] flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies [illegible] passed to the grantees in the royal charters [illegible] the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

Upon the acquisition of a Territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same rights as the

original States in the tide waters, and in [illegible]
them, or in their respective jurisdictions [illegible]
and rights of riparian or littoral proprietors in the soil
below high water mark, therefore, are governed by the laws
of the several States, subject to the rights granted to
the United States by the Constitution.

The United States, while they hold the country as a
Territory, having all the powers both of national and of
municipal government, may grant, for appropriate purposes,
titles or rights in the soil below high water mark of tide
waters. But they have never done so by general laws; and,
unless in some case of international duty or public exigency
have acted upon the policy, as well as the principle, that the
interest of the people and the object for which the
Territories were acquired, of leaving the determination
and disposition of the sovereign rights in navigable
waters, and in the soil under them, to the control of the
States, respectively, when organized and admitted into the
Union.

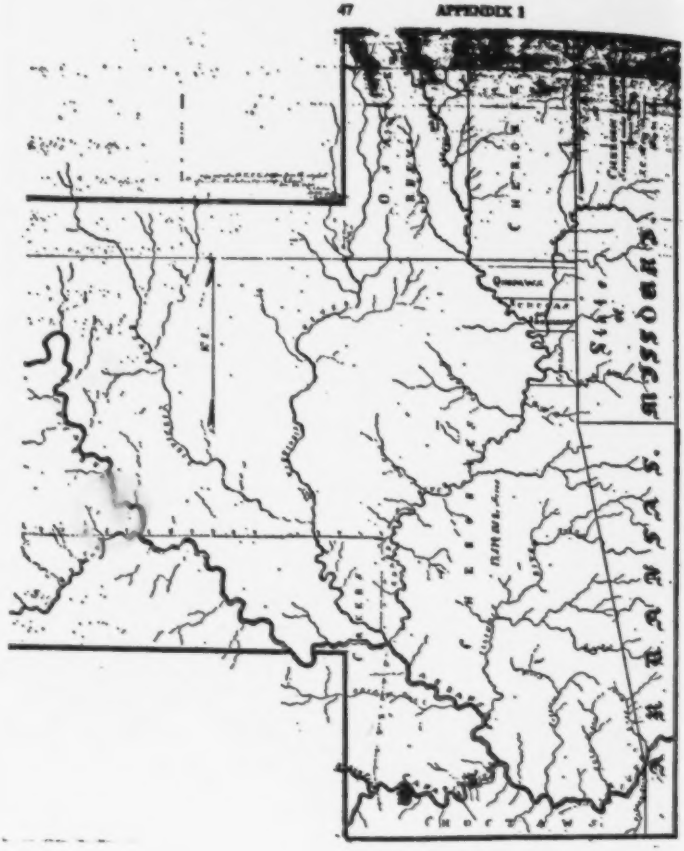
The Arkansas River throughout its length in the
Cherokee Nation is a navigable stream under the laws of the
United States.

Under the above-quoted holding of the court, it must
be conceded that when the State of Oklahoma was created, its
jurisdiction and ownership of the lands below high water mark
of all navigable streams within its boundaries, became vested in
in other words, when the United States conveyed by warranty deed
the land occupied by the Cherokees, Creeks, Choctaws, Chickasaws
and Seminoles, it did not convey the ownership of the beds of
navigable streams but reserved them for the benefit of the
future state within whose boundaries they would fall. Thus, the
State of Oklahoma, on its creation, became absolute owner of the
bed of the Arkansas River, and the Cherokee Nation is not en-
titled to royalty for any sand or gravel taken from the bed of
that river since November 16, 1907.

March 27, 1909. Very respectfully,

APPROVED: [signature] Secretary. [signature] Acting Commissioner

APPENDIX 3 Plat of Survey of Cherokee lands dated September 20, 1837, made under instructions from Isaac McCoy.



APPENDIX 4 Field notes dated September 19, 1831, of the Survey of the Cherokee line from the southwest corner of Missouri to Fort Smith on the Arkansas River.

Rec'd in the Gen'l Land Office, Comr. dated 6 Nov 1839, 1839. 1
Sup p 239

407 (No 3)

Field notes of the Survey of the Cherokee line from the South West corner of Missouri to Fort Smith on the Arkansas River.

September 19. 1831. Pursuant to instructions furnished, commenced at the South West corner of Missouri and proceeded South 35° East, the line crossed in a direct line to Fort Smith.

Magnetic variation, by the Compass was, N 15° E. 4 poles allowed. Distances and courses from the beginning of Each mile.

All trees on the line marked with a Hatchet and blazed, and a chip above and below, those marked on both sides of it, marked with a Hatchet, facing the line

No.	Bearing
1	S 35° E. Line headed near Hog. Thence over and through Timber. Pr. on Creek, set a stone post with stones, S 35° E 80 Links on line, marked B.T. 1 M., N 55° E 60 Links on line marked Cor. 1 M.
2.	Crossed creek, bank, open, inclined. Post oak 12 in. N. on Ch, set a stone from which, N 15° E 2 Links on line, marked B.T. 2 M., N 35° E 25 Links on line marked Cor. 2 M.
3	N. on Ch, to a Ravine, first water, bank land. N. on Ch, set a stone, near a pond of water. N. on Ch, set a stone. N. on Ch. set a stone.
4	N. on Ch, set a stone N. on Ch, set a stone N. on Ch, set a stone. N. on Ch, set a stone.
5	N. on Ch, to timber. Ravine, bank and bank land. Pr. to on timber Ravine, bank and bank land. N. on set a stone from which, N 35° E 80 Links on Ch, on line marked B.T. 5 M., N 55° E 60 Links on Ch, a pond marked Cor. 5 M.
6.	N. on Ch, on timber, first water and Ravine, pond land. N. on set a stone from which, S 35° E 80 Links on line marked B.T. 6 M., N 55° E 60 Links on line marked Cor. 6 M.

(24)

[APPENDIX]

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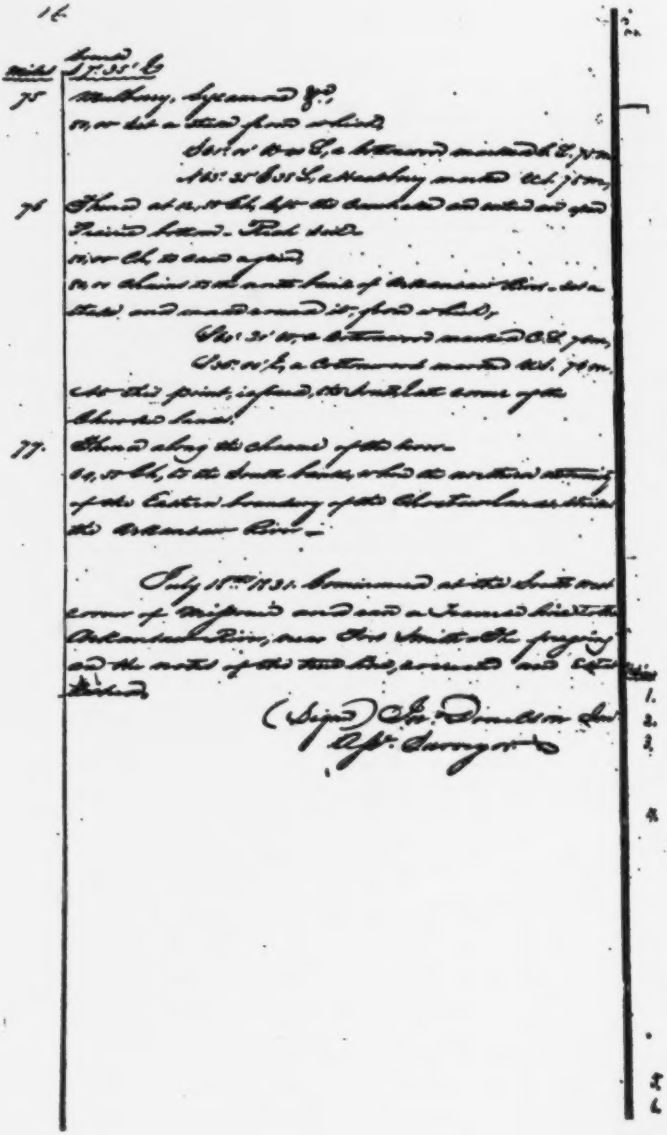


APPENDIX 5—Patent issued to Choctaws, dated March 23, 1842.

THE UNITED STATES OF AMERICA,

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, by the second Article of the Treaty began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty, (as ratified by the Senate of the United States, on the 24th February, 1831) by the Commissioners on the part of the United States, and the Mingoes, Chiefs, Captains, and Warriors, of the Choctaw Nation, on the part of said Nation, it is provided that "The United States under a grant specially to be made by the President of the U. S. shall cause to be conveyed to the Choctaw Nation a tract of Country West of the Mississippi river, in fee simple, to them and their descendants, to inure to them while they shall exist as a Nation and live on it:—Beginning near fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due South to Red river, and down Red river to the West boundary of the territory of Arkansas; thence North along that line to the beginning.—The boundary of the same to be agreeably to the treaty made and concluded at Washington City in the year 1825."

NOW KNOW YE, that the United States of America, in consideration of the premises, and in execution of the Agreement and stipulations in the aforesaid Treaty, Have Given and Granted, and by these Presents Do Give and Grant, unto the said Choctaw Nation, the aforesaid "tract of Country West of the Mississippi;" To Have and To Hold the same with all the rights, privileges, immunities, and appurtenances of whatsoever nature, thereunto belonging, as intended "to be conveyed" by the aforesaid Article, "in fee simple, to them and their descendants, to inure to them, while they shall exist as a nation and live on it," liable to no transfer or alienation, except to the United States, or with their consent.

IN TESTIMONY WHEREOF, I, John Tyler President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington the twenty third day of March in the year of our Lord one thousand eight hundred and forty two, and of the Independence of the United States the sixty sixth.

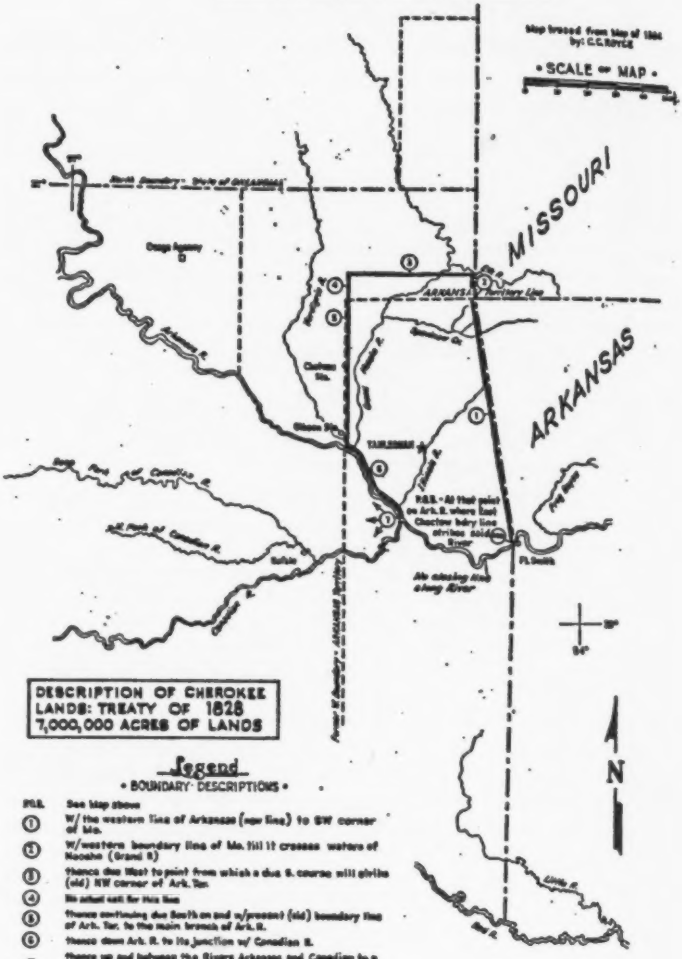
By the President, John Tyler.

Daniel Webster,
Secretary of State

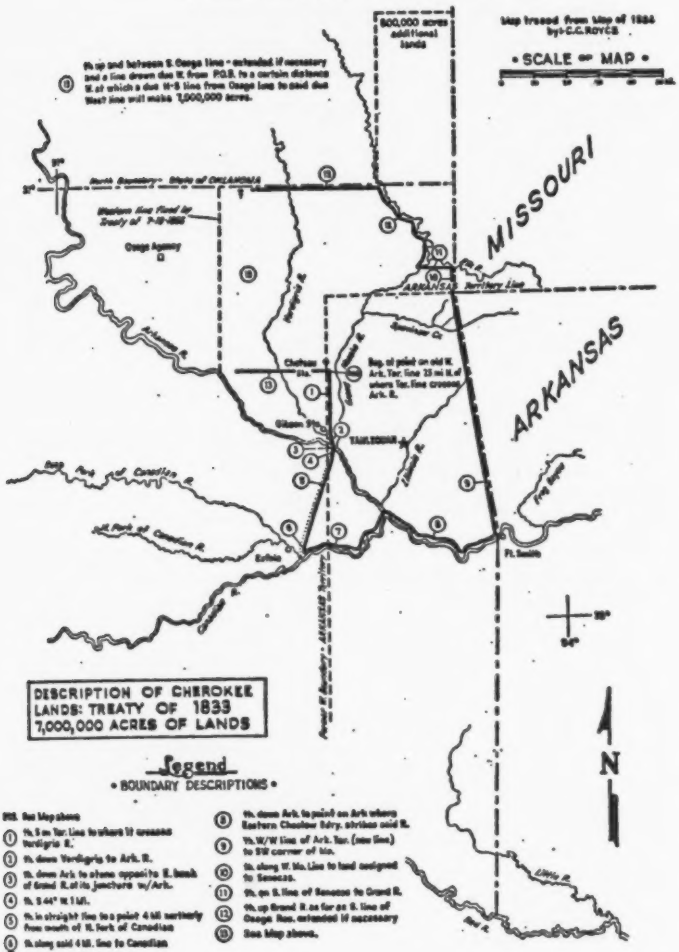
John C. Spencer
Secretary of War

T. Hartley Crawford
Commissioner of
Indian Affairs.

APPENDIX 6 Map showing Cherokee lands under 1828 treaty, traced from map by C. C. Royce dated 1884.



APPENDIX 7 Map showing Cherokee lands under 1833 treaty, traced from map by C. C. Royce dated 1884.



APPENDIX 8 Report No. 736, House of Representatives, dated June 27, 1848.

THIRTIETH CONGRESS—FIRST SESSION.

Report No. 736.

[To accompany bill H. R. No. 579.]

HOUSE OF REPRESENTATIVES.

INDIAN TERRITORY, WEST OF THE MISSISSIPPI.

JUNE 27, 1848.

Mr. McILVAINE, from the Committee on Indian Affairs, made the following

REPORT:

The Committee on Indian Affairs, to whom was referred the resolution of the House instructing the committee "to inquire into the expediency of organizing a territorial government in the Indian country west of the Mississippi, to which the Indians have been removed by the government," report:

That, from a careful examination of the subject, it appears that the policy of the government, from its foundation forward, has contemplated an organization of an Indian government or governments, in political connexion with the United States. Commencing under the confederation, as early as 1778, it has been repeated in various treaties with different tribes down to a recent date. In a treaty "of *agreement and confederation* made with the Delawares, in September, 1778," it was "further agreed on by the contracting parties, (should it, for the future, be found conducive for the interests of both parties,) to invite any other tribes who have been friends to the interests of the United States, to join the present confederation, and to form a State, whereof the Delaware nation shall be the head, and have a representative in Congress: *Provided*, nothing conthined in this article is to be considered as conclusive until it meets with the approbation of Congress."

A treaty made with the Cherokees, in 1785, provides "that the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."

The twenty-second article of the treaty of September 30, 1830,

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with the Choctaws, declares that "the chiefs of the Choctaws, who have suggested that their people are in a state of rapid advancement in education and refinement, have expressed a solicitude that they might have the privilege of a delegate on the floor of the House of Representatives extended to them. The commissioners do not feel that they can, under a treaty stipulation, accede to the request, but, at their desire, present it in the treaty that Congress may consider of, and decide the application."

The increase of the white population of the country, and the encroachments of their settlements upon the Indian lands, the desire on the one hand to obtain the valuable possessions of the Indians, and on the other to get rid of, and in future avoid collision with, and the injurious influences of the proximity of, the whites; to enjoy in their own way their own freedom of government, without any other interference than that which good fellowship imposes, and to relieve the States of the embarrassment of independent Indian governments within their midst; in a word, to collect together the various Indian tribes which were scattered over many of the States of the Union, in a country free from territorial or State government, and to secure to them permanently the possession of their property, the freedom of government, their advancement in civilization, and eventual political connexion with the States, led to treaties with the various Indian tribes which inhabited the States, for the cession of their lands and their removal to a territory west of the Mississippi, and which, by these treaties, was secured to them and their descendants forever.

The first step in this work, which, however, had not then assumed the character of a system, but which led to the very promising results that followed; a step, induced as it were, by the GREAT SPIRIT, by which, through a few of the most ignorant of these then ignorant people, a plan of deliverance, of protection, of civilization, of christianization, was taken in the fall of 1808. A proposition was then made by a portion of the Cherokee tribe "to remove across the Mississippi river on some vacant lands of the United States," (in consequence of "the scarcity of game where they then lived,") there to continue *the hunter life*." The President, in reply to this petition, in January following, said that "those who wish to remove, are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of the rivers."

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right."

Accordingly, in July, 1817, (the Indians above referred to having explored "the country on the west side of the Mississippi, and made choice of the country on the Arkansas and White rivers, and settled themselves down upon United States' lands, to which no

other tribe of Indians have any just claim,") a treaty was concluded with the Cherokee nation, by which they ceded to the United States the proportion of their land to which the emigrated Indians were entitled, for which they received an equal amount of land west of the Mississippi. But this location did not long remain "unapproached by our settlements," and a second treaty was made with the tribe in 1828, the preamble of which reads: "Whereas, it being the anxious desire of the government of the United States to secure to the Cherokee nation of Indians, as well those now living within the limits of the territory of Arkansas as those of their friends and brothers who reside in States east of the Mississippi, and who may wish to join their brothers of the West, a *permanent* home, and which shall, under the most solemn guarantee of the United States, be and remain theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing territory or State."

By the second article of the treaty, "the United States agree to possess the Cherokees, and to guarantee it to them forever, and that guarantee is hereby solemnly pledged, of seven millions of acres of land," west of Arkansas and Missouri, with an outlet west, "as far as the sovereignty of the United States and their right of soil extend." Another treaty was made with the Cherokees in 1835, by which they ceded to the United States all their remaining lands east of the Mississippi, and agreed to remove, with certain exceptions, to the country provided for them west.

In like manner the removal of another powerful tribe, the Choctaws, commenced in 1820, by exchanging for a small part of their land a country "beyond the Mississippi river, *where all who live by hunting, and will not work, may be collected together.*" This *selvage* of the tribe, separated from it, as expressed in the treaty, "to promote the civilization of the *east* Choctaw Indians by the establishment of schools among them," as with the Cherokees, became the nucleus about which the body of the nation gathered, "having far outstripped those they left behind in the arts of civilization and in the comforts of life." Of them it may be truly said: "The stone which the builders rejected, the same is become the head of the corner."

President Monroe, in his message to Congress in 1825, urged, as the best means of preserving and civilizing the Indian tribes, the policy of removal, by the acquisition from the native Indians of "a sufficient tract of country west of the State of Missouri and the Territory of Arkansas, in order to establish permanent settlements in that quarter of the tribes which were proposed to be removed." And Mr. Calhoun, then Secretary of War, in his report, recommended that "the strongest and most solemn assurances" should be given "that the country given them should be theirs as a permanent home for themselves and their posterity, without being disturbed by the encroachments of our citizens;" and, "to add to such assurances a system by which the government, without destroying

their independence, would gradually unite the several tribes under a simple but enlightened system of government and laws."

This recommendation of President Monroe was again pressed upon the notice of Congress by President Jackson in his annual message of December, 1829, who recommends the removal of the Indians from the States, and adds, "as a means of effecting this end, I suggest for your consideration the propriety of setting apart an ample district, west of the Mississippi, and without the limits of any State or territory now formed, to be guarantied to the Indian tribes as long as they shall occupy it; each tribe having a distinct control over the portion designed for its use. There they may be secured in governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes. There the benevolent may endeavor to teach them the arts of civilization, and, by promoting union and harmony among them, to raise up an interesting commonwealth, destined to perpetuate the race, and to attest the humanity and justice of this government."

On the 30th May following, an act was passed, in pursuance of this recommendation of President Jackson, providing for an exchange of lands with the Indians residing in any of the States or territories, and their removal west of the Mississippi. It also provides that, "in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, their heirs, or successors, the country so exchanged with them; and, if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

This act, adding to the executive recommendation the sanction of the legislative branch of the government, perfected a system of exchange, removal and guaranty, and pledged the national honor to its faithful observance.

Various treaties have since been made with the different tribes inhabiting the States, by which all of them have been removed or are in a state of removal. The first of these was made with the Choctaws, in September of the same year, by which they agree to "cede to the United States the entire country they own east of the Mississippi river," and to remove beyond it "as early as practicable." In consideration of which the United States promise to "cause to be conveyed to the Choctaw nation a tract of country west of the Mississippi river, in fee simple to them and their descendants, to enure to them while they shall exist as a nation and live on it, beginning," &c. It further provides that "the government and people of the United States are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits west, so that no territory or State shall ever have a right to pass laws for the government of the Choctaw nation of red peo-

ple and their descendants; and that no part of the land granted them shall ever be embraced in any territory or State; but the United States shall forever secure said Choctaw nation from and against all laws except such as from time to time may be enacted in their own national councils, not inconsistent with the constitution, treaties and laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress, under the constitution, are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing, by their own laws, any white man who shall come into their nation, and infringe any of their national regulations."

A treaty of similar import was concluded, in February, 1831, with the Seneca Indians of Ohio, "for the removal and permanent settlement of said tribe" west of the Mississippi; and the government agreed to "grant them, by patent, in fee simple, as long as they shall exist as a nation, and remain on the same, a tract of land, situate," &c., "for which the President of the United States shall cause letters patent to be issued, in due form of law, agreeably to the act of the last session of Congress."

Similar treaties were made with several other tribes, in the same year; and, in March, 1832, a treaty was concluded with the Creeks by which the tribe ceded to the United States "all their land east of the Mississippi river," having previously exchanged a portion of their lands for others west. This treaty provides that "the Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians; nor shall any State or territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also, as soon as the boundaries of the Creek country west of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe, agreeably to the act of Congress of May, 1830."

In the treaty of 1835 with the Cherokees, already referred to, the United States "covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time, without their consent, be included within the territorial limits or jurisdiction of any State or territory. But they shall secure to the Cherokee nation the right, by their national councils, to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their own people, or such persons as have connected themselves with them; provided, always, that they shall not be inconsistent with the constitution of the United States, and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and, also, that they shall not be considered as extending to such citizens, and army of the United States, as may travel or reside in the Indian country,

by permission, according to the laws and regulations established by the government of the same."

In this treaty, the pledge which had, theretofore, been given to them, that they should have a delegate in Congress, was repeated to them. The 7th article says: "The Cherokee nation, having already made great progress in civilization, and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition, as well as to guard and secure, in the most effectual manner, the rights guarantied to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the government of the United States towards the Indians, in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States, whenever Congress shall make provision for the same."

From the foregoing, it will be seen that the advantages obtained and promised by the United States, and the Indian tribes which inhabited the States, were reciprocal; the United States liquidating the Indian title to all lands within the States, and removing the occupants to a country free from State or territorial jurisdiction; the Indians freeing themselves from the inconvenience, and, in some instances, oppression of State jurisdiction, the injurious contamination of a proximity with the whites, and receiving the guaranty of the government for the permanency of their possessions, the independence of their government, and their ultimate admission to political equality with citizens of the United States.

The benefits resulting to the United States, under this policy, have been fully enjoyed; and it remains for this government to carry out, in good faith, its obligations to the weaker and dependant party. So undeniable is this obligation, that your committee consider it a question of *time* rather than *principle*. Has that time arrived? Your committee believe that it has. Nor is it *now* for the first time so considered. In 1826, the Secretary of War (Mr. Barbour) recommended the organization of a territorial government over the Indian country west, and the Committee of Indian Affairs reported a bill to that effect. This bill, however, proposed a government *under the jurisdiction of the United States*, and cannot be considered in full accordance with the policy which was subsequently adopted.

The Secretary of War, Mr. Eaton, in his report submitted at the opening of the first session of the 21st Congress, (December, 1829,) remarked, in reference to the preservation of the Indian tribes, "No better plan can be thought of than that the United States shall put in operation such a system of Indian protection and government, west of Mississippi, as that a confidence may be reposed that they are, indeed, our fostered children, and the government not only so disposed to consider, but practically to evince their good feeling towards them;" and adds: "I beg leave to suggest for your consideration if an Indian territory, without the range of western States or territories, might not be advantageously created."

This subject engaged the attention of Congress in different forms until May, 1834, when the Committee on Indian Affairs, through

Mr. H. Everett, and upon the recommendation of the Executive, made a very elaborate report, accompanied by a bill providing for the organization of an *Indian territory*, securing to the Indian tribes all the rights and privileges guaranteed to them by treaty, and carrying out the oft expressed intentions of the government towards this interesting remnant of the original proprietors of the territory over which our great and glorious republic now extends.

The report sets out with this declaration: "Whatever difference of opinion may heretofore have existed, the policy of the government, in regard to the future condition of these tribes of Indians, may now be regarded as definitively settled. To induce them to remove west of the Mississippi, to a territory set apart and dedicated to their use and government forever; to secure to them there a final home; to elevate their intellectual, moral, and civil condition, and to fit them for the enjoyment of the blessings of free government, is that policy. And a further hope is now encouraged, that whenever their advancement in civilization should warrant the measure, and they desire it, that they may be admitted as a State, to become a member of the Union."

This bill failed to become a law; and in February, 1836, a new one was introduced, "to provide for the security and protection of the emigrant and other Indians west of the State of Missouri and of the Territory of Arkansas." This bill also described the boundaries of an "Indian territory," and, as the former, pledged the faith of the country to the Indians for its perpetual possession. It, too, failed to become a law.

A very full and interesting report was made to Congress at its next session, by the Commissioner of Indian Affairs, C. A. Harris, upon this subject, in which, after reviewing the action of the government in relation to these Indians, he proceeds to say: "I beg leave to observe, that the aspects, under which it now presents itself, differ materially from those in which it was submitted to Congress in 1825 and 1826. The plan of removing the Indian tribes from the States and territories was then, comparatively, in its infancy. Districts of country west of the Mississippi had been assigned to the Choctaws and Cherokees, but only a small number of either tribe had emigrated. And the views of the Executive seem to have been directed to the subject of a government for those who had gone, or might go, more as an inducement to them to remove, than as a measure immediately demanded for their protection, peace, and prosperity by any existing relations. But the act of May, 1830, gave to this matter a new character. It distinctly authorized treaties for the exchange and cession of lands, the conveyance in fee of equivalent tracts to the Indians, and the extension to them, at all times, of adequate protection. Since its passage, the current of emigration has been constantly flowing, with different degrees of rapidity at different times."

The bill last named (February, 1836) was, by direction of the Commissioner of Indian Affairs, submitted to the different tribes inhabiting the Indian country by an agent of the government, and their views taken upon the subject, after its being fully explained

to them. Most of the tribes were unanimous in their concurrence in the measure, and desired that it might "be carried into effect as soon as practicable." The Choctaws are the only tribe which appear to have dissented.

The Secretary of War, Mr. Spencer, in his report to the third session of the 27th Congress, after speaking of the inadequacy of the present system of superintendents and agents to secure the Indians against the frauds and vices of the whites who hover upon their borders, remarks: "The plan of something like a territorial government for the Indians has been suggested. The object is worthy of the most deliberate consideration of all who take an interest in the fate of this helpless race."

The subject was again brought before Congress at the session of 1845-'46, by the memorial of the "American Mission Association," and a report was made by the Committee on Indian Affairs on the 22d June. The committee, after reviewing the action of the government in relation to the Indian tribes, proceed to say: "It is sufficiently evident to the committee, from a contemplation of our existing relation with the Indian tribes referred to, resulting from the rapid growth and progress of our population, that we have approximated the point when this government must decide whether existing guarantees of treaties with those tribes shall be maintained in the spirit which dictated them; whether those guarantees are sufficient for the avowed object of providing a home for the red man forever in the country assigned him; or, whether those treaties are to be set at naught, the experiment of civilization arrested, and the red race again be driven and dispersed into the wilderness." "A feeling of distrust and alarm is getting abroad on this subject among those who have long proved themselves the sincere and disinterested friends of the Indian, and for the policy adopted for the amelioration of his social condition."

"The committee will neither assert nor deny that this feeling has any just foundation in the existing condition of our relations with the Indians. It is sufficient for their purpose that it exists, and that it paralyzes, and will, until removed, continue to paralyze the efforts of good men, having for their object the cultivation and elevation of the moral attributes of the aboriginal race.

"Impressed with such like convictions, the committee do not hesitate to express their opinion that the policy of this government, as indicated by treaties with the removing tribes, so far as relates to the integrity and inviolability of territory, ought not to be abandoned, and that the guarantees of a home by those treaties should be maintained in good faith."

The committee reported a bill defining the Indian territory, but it was not acted upon by the House.

Mr. Secretary Wilkins, in his report to the 2d session, 28th Congress, in referring to the emigrated Indians, says: "In the course of the progress under our moral enterprise, for their civilization, they must eventually obtain the sagacity to look out for individual and social rights, and that degree of general intelligence to entitle them to the full extension of all the privileges of American citi-

zens. When that time shall arrive, there will be no obstacle to political association by reason of any natural or acquired repugnance to the blood of the original American."

A report made in 1836, by the acting superintendent of Indian affairs in the western territory, Captain Wm. Armstrong, in compliance with the instructions from the commissioner, represents the condition of these emigrated Indians, at that time, highly prosperous and encouraging; a condition which the commissioner very justly remarks, "forms one of the arguments upon which the expediency of establishing a government competent to afford security and protection may be rested." The Choctaws were governed by a written constitution and laws, and had an annual general council. The chase was nearly abandoned for a living, and was pursued more as an excursion of pleasure than a source of gain. The Cherokees were far advanced in civilization. Among them were many highly intelligent men, and they had made great progress in agriculture and the mechanic arts. The Creeks and the smaller tribes had also made considerable advancement in agriculture, and they all had the means of education. Within the limits of the three larger tribes—the Choctaws, Cherokees, and Creeks—there were then seventeen churches.

The progress of civilization and improvement which, at that time, was so flatteringly described, has steadily advanced. The reports since made show that much attention has been paid to education by many of the tribes, and their example has exerted a beneficial influence over their less enlightened neighbors. The church and the school-house mark every where the march of civilization, and "the hunting path has been effaced by the ploughshare." Several of the tribes have established academies of learning, supported by their ample education funds, which would not suffer by a comparison with similar institutions of our own, and none of the tribes are without primary schools. The reports show a constant increase of scholars, male and female, and some of their best teachers of either sex are of Indian blood. The children are found to be fully as capable and ready in receiving instruction as our own race, and it were useless to add that, learned or unlearned, in peace or in war, from "Philip" down to the present day, the brighest intellect and the noblest spirit has marked the red man's fame.

The Cherokees, as well as the Choctaws, have a written constitution and laws, courts of justice, legislative council of two branches, and all the machinery of civilized government. The introduction of manual labor schools has greatly advanced the cause of education amongst the Indian tribes by uniting with ordinary instruction, the science of agriculture and the mechanic arts. The youth thus educated return to their people with a fund of *practical* knowledge, which commends them to their respect and admiration, and gives them an influence for usefulness which *letters* alone could not command. The first of these schools was introduced by the Methodist mission at Fort Leavenworth, and others have since been established amongst various tribes by the

Presbyterian, Friends, and Catholic societies. The Baptists, Moravians, and other religious and benevolent societies have done much for the improvement of these people by sending missionaries and teachers amongst them; but as civilization and education advance, these posts of instruction and usefulness are gradually filled by their own race.

Intemperance, that crowning vice of the Indian—the accursed legacy of the white man, has decreased in the ratio of their advancement in the arts of civilized life. Several of the tribes have enacted stringent prohibitory laws against its introduction, temperance societies are numerous, and in some of the tribes intoxication is said to be very rarely seen. Can we, with such a cheering history before us, longer withhold the hand of fellowship and union from a people who have such unspeakable claims upon our sympathy and protection?

Nothing, your committee believe, would so hasten the progress of civilization, and promote the improvement and happiness of these tribes, as the immediate fulfilment of the policy long and constantly indicated by the government; the integrity of their territory, independence of government, and political equality. Whatever embarrassments may have been in the way of fulfilling our treaty stipulations with a portion of these people upon former occasions, growing out of conflicting, federal, and state rights, no such impediments exist now. The Indian title to the western territory has been extinguished by the government, and Congress has the unqualified power to dispose of it as it please. A portion of it has been conveyed to the Indian tribes by treaty, and it is now proposed to perpetuate the title by patent or grants, as promised by those treaties. Your committee do not suppose that there can ever be any disposition on the part of the government to violate its plighted faith with these comparatively helpless people; but it appears that apprehensions do exist as to the inviolability of their territory, which tend to disturb their tranquility, and retard their improvement.

The committee report a bill, which is hereto annexed, embracing the general principles of the bill of 1834, with some modifications suited to the improved condition of the tribes. It describes the territory and dedicates it forever to the Indian tribes, to whom it has been or may hereafter be granted; securing to each tribe the unqualified right of self government, with jurisdiction over all persons and property within their respective limits, subject to certain exceptions founded upon established principles of international law, reserving to this government that constitutional power which it could not surrender—the regulation of trade with the Indian tribes. It also gives to the respective tribes forming the confederacy, the power of trial and punishment of all persons not belonging to the same, who may offend against their laws, subject to the approval of the governor, and in cases of capital offence the pardoning power is reserved to the President. And, for the better security of life and the promotion of peace between the several tribes, capital offences committed by a member of one tribe

upon that of another, shall be subject to the regulations of the general council. It provides for a confederation of the respective tribes inhabiting the territory, who may accede thereto, with a governor, appointed in the first place by the President, a national council, and a delegate in the House of Representatives, leaving everything which can safely and profitably be committed to them to their own management and control; and contemplating a gradual withdrawal of all agency of the government in the management of their concerns, as fast and as early as their condition and the interests of the government will permit; and, to satisfy the Indians that no undue advantage is intended to be taken by the government of the tribes entering into the confederacy, provision is made for the recession of any of them whenever they shall desire so to do.

The confederation of the several tribes, and the annual assembling of delegates of their own selection, in a common council, would be a powerful stimulant to improvement. The association upon these occasions of the more intelligent members of the different tribes, would not only diffuse knowledge and a spirit of emulation throughout the whole, but it would unite them in a common bond of amity and strength. By giving them a representative in Congress, they would feel that they were no longer considered inferiors, strangers, jealous of the encroachments of power, but part and parcel of ourselves, possessing the rights and enjoying the privileges of citizens. A vigilant guardian would be placed over the administration of their affairs, and abuses and suspicions of abuse would be prevented or removed. The present expensive system of agencies, sub-agencies, and superintendencies, might be withdrawn as they became capable of managing their own affairs; and military posts, the presence of which is represented as being fraught with mischief and discontent to the Indian, being no longer required by the hostile, or supposed hostile relation which these people bear towards us, another source of expense would thereby be removed.

With these remarks the committee submit the question to the House, confident in the hope that a subject so full of interest to the red man, whose green woods and fertile plains have been again and again yielded up to the demands of civilization, until he at last rests upon our utmost verge, whose safety, if not his existence, hangs upon it, will not fail to engage its early and favorable attention.

A BILL to provide for the organization of an Indian Territory, west of the Mississippi river.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all that part of the territory of the United States bounded on the east by the States of Arkansas and Missouri, as far north as the south bank of

the Missouri river; on the northeast by the south bank of the said Missouri river, to the mouth of the river Platte; on the north by the south bank of the said river Platte to where its north branch crosses the forty-second degree of north latitude nearest to the twenty-eighth degree of longitude west from the city of Washington, and by a line upon said latitude to the Mexican possessions, and bounded west and south by the said Mexican possessions, shall constitute a territory to be called the Indian Territory.

SEC. 2. *And be it further enacted*, That the said territory shall be forever hereafter reserved for the use of the various Indian tribes who may have a right to the same, and the faith of the United States is hereby pledged that all that part of the said territory which has been or may be granted to any of the Indian tribes, shall be, and the same is hereby, secured to them and their heirs and descendants forever, and the United States will cause a grant or patent to be made and executed for the same. And in case any two or more tribes shall unite and form a single tribe, the grants to such tribes shall enure to the benefit of such united tribe on such terms as such tribes shall agree upon: *Provided*, That such land shall revert to the United States, if the Indians, for whose benefit such grants have been or may be made, should become extinct, or abandon them.

SEC. 3. *And be it further enacted*, That each of the tribes residing within the said territory may establish and maintain such government for the regulation of their own internal affairs as to them may seem proper, not inconsistent with the constitution of the United States, or the laws thereof.

SEC. 4. *And be it further enacted*, That until otherwise provided by the people of the said territory, through the general council, and with the approval of Congress, a Governor of the said territory shall be appointed by the President, by and with the advice and consent of the Senate, who shall be, ex officio, superintendent of Indian affairs of said territory for the term of three years, and who shall take an oath of office, and shall receive, as governor and superintendent, an annual salary of three thousand five hundred dollars, which shall be in full of all charges, allowances, and emoluments of whatever nature or kind. And the said governor shall reside at such place within said territory as may be directed by the President of the United States, and shall execute such duties as may be enjoined by law, or as may be directed by the President.

SEC. 5. *And be it further enacted*, That a secretary of the said territory shall be appointed by the President, by and with the advice and consent of the Senate, for the term of four years, who shall take an oath of office, and shall receive an annual compensation of fifteen hundred dollars, which shall be in full of all charges, allowances, and emoluments of whatever nature or kind. And it shall be the duty of the said secretary to reside at the place appointed by the President of the United States for the residence of the governor. He shall keep a record of all the official proceedings of the governor of the said territory, and annually transmit copies of the same to both Houses of Congress. He shall also discharge the

duties of governor of said territory during the vacation of the office, or in the absence therefrom of the governor, and shall fulfil such other duties as shall be enjoined by law, or as may be directed by the President of the United States.

Sec. 6. *And be it further enacted*, That as soon as may be after his appointment, the said governor shall convene, at some proper point, a sufficient number of the chiefs, or other representatives of the various tribes who may reside within the said territory, and shall submit to them, for their assent, such of the provisions of this act as require the co-operation of the authorities of the respective tribes, in order to carry the same into effect, and such assent, if given, shall be in writing and in duplicate, one of which duplicates shall be transmitted to the War Department, and the other shall be preserved in the office of the said governor: *Provided*, The articles of confederation shall not be binding upon any tribe unless assented to by the chiefs of such tribe, being previously authorized thereto, or unless they shall be ratified by such tribe: *Provided, also*, That such confederation shall not take effect until the tribes assenting thereto shall, in the aggregate, number at least one-fourth of the whole amount, and that thereafter other tribes in said territory may join said confederacy, and become members thereof: *And provided, further*, That any tribe entering into this confederacy may, at any time, recede therefrom by giving six months' notice to the governor of their desire so to do, in the same manner as their assent to this act is required to be given, and the governor shall immediately inform the Secretary of War of the same.

Sec. 7. *And be it further enacted*, That a general council of the several tribes giving their consent, and forming the confederacy thus provided for, shall be annually held, at such time and place as may be fixed by the governor. The said council shall consist of not less than one, nor more than five delegates from any tribe, who shall be elected by the respective tribes, or selected from the existing chiefs in proportion to their numbers, which proportion shall be determined by the governor. The general council shall have power to make all needful regulations respecting the intercourse among the several tribes, to preserve peace, to provide for their common safety, and, generally, to enact such laws as the welfare of the confederation shall demand, and as may be necessary to give effect to the purposes of this act, not inconsistent with the constitution and laws of the United States. All the laws and regulations adopted by the said council shall be submitted to the governor, for his consideration, and shall have no force unless approved by him. The governor shall also have power to convene the said council upon extraordinary occasions, and at all times to adjourn it. And the members of the council shall, until otherwise provided, receive from the United States three dollars each, per day, during their attendance at the sessions thereof, and their reasonable expenses to be settled by the governor, in going to and returning therefrom: *Provided*, That nothing herein contained shall interfere with the right of the general government to regulate the trade and inter-

course between the United States, and the Indian tribes within said territory.

Sec. 8. *And be it further enacted*, That all officers and persons in the service of the United States, and all persons employed under treaty stipulations, and all persons travelling in, or through, said territory, and not residents thereof, shall be under the protection of, and subject to, the laws of the United States. And if any such officer or person shall, within said territory, commit any offence against the laws of any tribe of this confederacy, he may be tried and punished under the laws of said tribe; subject, however, to the approval of the governor, who may confirm or remit the said judgment, or remove such offender from the limits of said tribe: *Provided*, That, when the penalty be death, the judgment shall be forthwith communicated to the President, by the governor, who shall supend the execution thereof until the pleasure of the President be known. And whenever an Indian of one tribe, or any other person residing therein, except as above provided, shall commit a capital offence upon a member, or resident, of another tribe, he or she shall be apprehended, tried, and punished in such manner as shall be previously provided by the general council.

Sec. 9. *And be it further enacted*, That in accordance with pledges heretofore given by treaty, with some of the Indian tribes herein proposed to be erected into a territorial government; to promote their advancement, protect their interests, and bind them more closely to the government of the United States, it shall be competent for the said confederate tribes to elect, in such manner as the general council shall prescribe, a delegate to Congress, who shall have the same powers, privileges, and compensation as the delegates of the respective territories have.

Sec. 10. *And be it further enacted*, That it shall be lawful for any of the tribes entering into this confederacy, or the general council, to adopt, as the law of such tribe or confederacy, any, or all, of the prohibitory provisions of the laws of the United States regulating trade and intercourse with the Indians and Indian tribes, with such penalties as shall be approved by the governor, and establish tribunals for the trial of offenders against the same. And it shall be the duty of the governor to use all necessary means to carry the same into effect.

Sec. 11. *And be it further enacted*, That nothing in this act shall be construed as authorising or directing the violation of any existing treaty between the United States and any of the Indian tribes; nor shall anything in this act be construed as changing the relations now existing between the United States and any tribe within said territory, which shall not become a member of said confederacy.

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1848

U.S. Congress. House. Committee
on Indian Affairs.

Indian Territory west of the
Mississippi.

APPENDIX 9 — Patent issued to the Cherokees, dated December 31, 1838.

COPY OF PATENT TO CHEROKEE NATION, DATED DECEMBER 31, 1838

PATENT.

THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, by certain treaties made by the United States of America with the Cherokee Nation of Indians of the sixth day of May, one thousand and eight hundred and twenty-eight, the fourteenth of February one thousand eight hundred and thirty-three, and the twenty-ninth of December, one thousand eight hundred and thirty-five. It was stipulated and agreed on the part of the United States, that in consideration of the premises mentioned in the said treaties, respectively, the United States should guaranty, secure, and convey by patent to the said Cherokee Nation, certain tracts of land; the description of which tracts, and the terms and conditions on which they were to be conveyed, are set forth in the second and third articles of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, in the words following, that is to say:

Art. 2nd. WHEREAS, by the treaty of May 6th, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty-three, with the Cherokees west of the Mississippi, the United States guaranteed and secured, to be conveyed by patent to the Cherokee Nation of Indians the following tract of country: Beginning at a point on the old western territorial line of Arkansas territory, being twenty-five miles north from the point where the territorial line crosses Arkansas River; thence running

from said north point south on the said territorial line, where the said territorial line crosses Verdigris River; thence down said Verdigris River to the Arkansas; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand River, at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence in a straight line to a point four miles northerly from the mouth of the North Fork of the Canadian; thence along the said four mile line to the Canadian; thence, down the Canadian to the Arkansas, thence, down the Arkansas to that point on the Arkansas where the Eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory, as now defined, to the southwest coner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to the Grand River; thence up said Grand River, as far as the south line of the Osages reservation extended, if necessary; thence up and between said south Osage line, extended west if necessary; and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line, will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend, Provided, however, that if the saline or salt plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees, and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed. And WHEREAS, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient

quantity of land for the accommodation of the whole nation, on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars, therefore hereby covenants and agree to convey to the said Indians and their descendants, by patent, in fee simple, the following additional tracts of land, situated between the west line of the State of Missouri and the Osage Reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage Reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south, fifty miles; thence west to the place of beginning; estimated to contain eight hundred thousand acres of land but it is expressly understood, that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds the same shall be reserved and excepted out of the lands above granted, and a pro rata reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

Art. 3. The United States also agree that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the president of the United States, according to the provisions of the act of May twenty-eighth, one thousand eight hundred and thirty. It is, however agreed that the military reservation at Fort Gibson shall be held by the United States. But should the United States abandon said post, and have no further use for the same, it shall revert to the Cherokee Nation. The United States shall always have the right to make and establish such posts and military roads and forts in any part of the Cherokee country, as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials

of all kinds, for the construction and support of the same, as may be necessary; Provided that if the private rights of individuals are interfered with, a just compensation therefor shall be made.

And WHEREAS, the United States has caused the said tract of seven millions of acres, together with the said perpetual outlet to be surveyed in one tract, the boundaries whereof are as follows: Beginning at a mound of rocks four feet square at base and four and one-half feet high, from which another mound of rocks bears south one chain and another mound of rocks bears west one chain on what has been denominated the Old Western Territorial line of Arkansas Territory, twenty-five miles north of the Arkansas river; thence south twenty-one miles and twenty-eight chains to a post on the northeast bank of the Verdigris river, from which a hackberry fifteen inches diameter, bears south sixty-one degrees, thirty-one minutes east, forty-three links marked C.H.L. and a cottonwood forty-two inches diameter bears south twenty-one degrees fifteen minutes east, fifty links, marked C.R.K.L.; thence down the Verdigris river, on the northeast bank, with its meanders to the junction of Verdigris and Arkansas rivers; thence from the lower bank of the Verdigris river on the north bank of the Arkansas river, south forty-four degrees, thirteen minutes east, fifty-seven chains to a post on the south bank of Arkansas, opposite the eastern bank of Neosho river at its junction with Arkansas, from which a red oak thirty-six inches diameter, bears south seventy-five degrees, forty-five minutes west, twenty-four links, and a hickory, twenty-four inches diameter, bears south eighty-nine degrees, east four links; thence south fifty-three degrees west, one mile to a post from which a rock bears north fifty-three degrees east fifty links and a rock bears south eighteen degrees, eighteen minutes, west fifty links; thence south eighteen degrees, eighteen minutes west, thirty-three miles twenty-eight chains and eighty links, to a rock from which another rock bears north eighteen de-

grees eighteen minutes east, fifty links, and another rock bears south fifty links, thence south four miles to a post on the lower bank of the north fork of the Canadian river, at its junction with the Canadian river, from which a cottonwood, twenty-four inches diameter, bears north eighteen degrees east, forty links, and a cottonwood fifteen inches diameter, bears south nine degrees, east fourteen links; thence down the Canadian river on its north bank to its junction with Arkansas river; thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas river, four chains and fifty-four links east of Fort Smith; thence north seven degrees and twenty-five minutes west, with the western boundary of the State of Arkansas, seventy-six miles, sixty-four chains and fifty links to the southwest corner of the State of Missouri; thence north on the western boundary of the State of Missouri, eight miles, forty-nine chains and fifty links, to the north bank of Cow Skin or Seneca river at a mound six feet square at base and five feet high, in which is a post marked on the south side Cor. n. Ch. Ld.; thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains to a post on the east bank of Neosho river, from which a maple eighteen inches in diameter bears south thirty-one degrees east, seventy-two links; thence up Neosho river, with its meanders, on the east bank, to the southern boundary of Osage lands, thirty-six chains and fifty links west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west banks of Neosho river; thence west on the southern boundary of the Osage lands; to the line dividing the territory of the United States from that of Mexico, two hundred and eighty-eight miles, thirteen chains and sixty-six links, to a mound of earth six feet square at base, and five and a half feet high, in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence south along the line of the territory of the United

States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited a cylinder of charcoal, eighteen inches long and three inches diameter; thence east along the northern boundary of the Creek lands two hundred and seventy-three miles, fifty-five chains and sixty-six links, to the beginning; containing within the survey thirteen millions, five hundred and seventy-four thousand, one hundred and thirty-five acres and fourteen-hundredths of an acre. And whereas, the United States have also caused the said tract of eight hundred thousand acres to be surveyed and have ascertained the boundaries thereof to be as follows:

Beginning at the southeast corner of the Osage lands, described by a rock, from which a red oak, twenty inches diameter bears south twenty-seven degrees east, seventy-six links, and a burr-oak, thirty inches diameter, bears south fifty-nine degrees west one chain; and another burr-oak thirty inches diameter bears north eight degrees west, one chain and thirty-seven links; and another burr-oak forty inches in diameter bears north thirty degrees west, one chain and eighty-one links and running east twenty-five miles to a rock on the western line of the State of Missouri, from which a post oak ten inches diameter, bears north forty-eight degrees, thirty minutes east, four chains; and a post oak twelve inches diameter bears south sixty-two degrees east, five chains; thence north, with the western boundary of the State of Missouri, fifty miles, to a mound of earth five feet square at base and four and one-half feet high; thence west twenty-five miles to the northeast corner of the lands of the Osages, described by a mound of earth six feet square at the base and five feet high; thence south along the eastern boundary of Osage lands, fifty miles, to the beginning; containing eight hundred thousand acres.

Therefore in execution of the agreements and stipulations contained in the said several treaties, the United

States has given and granted, and by these presents do give and grant, unto the said Cherokee Nation, the two tracts of land, so surveyed and hereinbefore described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre: To Have and To Hold the Same, together with all of the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever, subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plains on the western prairie, referred to, in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent, and in the manner, in which the said rights are so reserved; and subject also to the condition provided by the Act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty; referred to in the above recited third article, and which condition is, that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same.

IN TESTIMONY WHEREOF, I, MARTIN VAN BUREN, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the thirty-first day of December, in the year of Our Lord, one thousand eight hundred and thirty-eight, and of the Independence of the United States, the sixty-third.

(SEAL) By the President, M. VAN BUREN.

(Signed) H. M. GARLAND, Recorder of the General Land Office.

APPENDIX 10—Chapter II, Mills' "Oklahoma Indian Land Laws," Thomas Law Book Co., 2d Edition, 1924.

OKLAHOMA INDIAN LAND LAWS

Second Edition

By Lawrence Mills

Published 1924

(Italics is by Counsel for Respondents)

CHAPTER II.

AUTHORITY OF CONGRESS OVER THE INDIANS

§ 4. Title by Discovery.
5. Relation of Indian Tribes to the United States.
6. Treaty with Indian Tribe Not a Contract.
7. United States Citizenship.
8. Authority of Congress, Plenary.

§ 4. **Title By Discovery.**—Upon its discovery by Europeans, America was in the exclusive possession of the Indians, a people in a state of barbarism, who lived by hunting, and practiced agriculture only in a most limited and primitive manner. To the minds of the Europeans, America was a virgin and unpeopled continent, and they found no difficulty in convincing themselves that the natives were more than compensated for the loss of their independence by the blessings of Christianity which they were able to bestow. Accordingly, the great nations of Europe lost no time in appropriating to themselves such parts of the new world as they were able to acquire. But as each of these nations was in pursuit of the same object, it was necessary, in order to avoid war and contentions between themselves, to establish a principle governing such acquisition that should be acknowledged and observed by them all. This principle was found in the doctrine that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments.

The relation between the discoverer and the Indians who inhabited the territory, did not concern the other European nations and became a matter of policy for each nation to determine for itself.

By each of the nations, England, France, Spain and Holland, who laid claims to parts of North America by virtue of the title of discovery, *the right of occupancy* was recognized in the Indians, but the ultimate dominion and sovereignty of the soil was asserted in themselves. Each asserted as a corollary of its claim of ultimate dominion, the exclusive prerogative to extinguish the Indians' right of occupancy and denied to all others the privilege of acquiring any interest in the soil by grant from the Indians.

As a result of the war by which the independence of America was achieved, the United States succeeded to all of the dominion, sovereignty and right which England had theretofore had to the soil of America, except Canada, and the rights of France and Spain were afterwards acquired by purchase. The title of the United States to the land occupied and claimed by the Indians is thus based upon conquest, but its validity is a political and not a judicial question, and the manner of its acquirement was recognized as legitimate by all of the civilized nations of the world. Chief Justice Marshall has summed up the question as follows:

"We will not enter into the controversy whether agriculturalists, merchants and manufacturers have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim which has been successfully asserted. The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all of the lands occupied by the Indians within the chartered limits of the British colonies. It asserted also a limited sovereignty over them and the exclusive right of extinguishing the title which oc-

cupancy gave to them. These claims have been maintained and established as far west as the Mississippi River by the sword. The title to a vast portion of the land we now hold, originates in them. It is not for the courts of this country to question the validity of this title or to sustain one which is incompatible with it."[1]

§ 5. **Relation of Indian Tribes to United States.**—The relation of the Indian tribes to the United States has from the beginning been of an anomalous and complex character. Though they occupied territory within the boundaries of the United States they were not a political part of the United States.[2]

Each tribe constituted a distinct, independent, political community, exercising within its territory and with respect to its internal affairs, all of the powers of local self-government and administering its own laws, customs and usages. It was, in every respect, a Nation, within the general acceptation of that term and capable of contracting treaties as such.[3]

But while the several tribes exercised all the attributes of sovereignty within their recognized tribal domains, they occupied territories to which a superior power asserted and maintained the ultimate dominion and the exclusive right to the soil upon the extinguishment of the right of occupancy conceded to the natives. The assertion of dominion by the United States was inconsistent with complete sovereignty in the Indian tribes, and the attempt of any foreign nation to enter into relations with them, or to acquire any interest in their lands, would be considered an invasion of the sovereignty of the United States and an act of hostility. By virtue of such claims of dominion, an Indian tribe was

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[1]Johnson v. McIntosh, 8 Wheaton, 574; 5 L. Ed. 541; Cherokee Nation v. Georgia, 5 Peters 48; 8 L. Ed. 25.

[2]In re Crow Dog, 109 U.S. 556; 27 L. Ed. 1030.

[3]Worcester v. Georgia, 6 Peters 575; 8 L. Ed. 483; Turner v. U.S., 248 U.S. 354; — L. Ed. —.

not, with respect to the United States, a foreign nation within the meaning of the provision of the Constitution giving the federal courts jurisdiction of controversies "between a State or citizens thereof, and foreign states, citizens or subjects," and it could not maintain a suit therein.[4]

Full authority and sovereignty over the Indian tribes has been exercised by the Federal government through Congress from the beginning varying in the extent of its application only by expediency or the power of the United States to enforce it. Such authority of the general government does not emanate from any particular section of the Constitution and is not derived from the provision granting it "power to regulate commerce with foreign nations, and among the several States and with the Indian tribes." It is much broader than that. It is an inherent one, arising from its political relations with those dependent people. This sovereignty of the government is exercised through Congress as the instrument established by the Constitution for the expression of its legislative will. Justice Miller in United States v. Kagama, has outlined the source of the authority of the Federal government over the Indian Tribes as follows:

"The power of the General Government over these remnants of a race, once powerful, now weak and diminished in numbers, is necessary to their protection as well as to the safety of those among whom they dwell. It must exist in that government because it never have existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its law on all the tribes."[5]

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[4]Cherokee Nation v. Georgia, 5 Peters 48; 8 L. Ed. 25; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L. Ed. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L. Ed. 291; United States v. Rogers, 4 Howard 572; 11 L. Ed. 1105; Jones v. Meechan, 175 U.S. 1, 44 L. Ed. 49.

[5]United States v. Kagama, 118 U.S. 375, 30 L. Ed. 228; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L. Ed. 1041.

The tribes were declared by Chief Justice Marshall in Cherokee Nation v. Georgia, to be in a "state of pupilage," and their relation to the United States to be that of a ward to his guardian. Such designation has been generally adopted by the courts as expressive of the authority of the authority of the United States over the Indian tribes, who are usually referred to as "wards of the Nation," "pupils," "local dependent communities."

By reason of the relation between the United States and the tribes, the exercise of its authority is a political question, addressing itself solely to Congress and not subject to control by the courts. Congress has plenary power and authority over the tribes, tribal affairs and property when it sees fit to exercise it, and from the very nature of the relation, there is no authority above Congress that they can invoke.[6]

§ 6. **Treaty With Indian Tribe Not a Contract.**—It has been the practice of the United States from the beginning of the government to the present time to exercise its paramount authority over the Indians by treaties negotiated with the different tribes. Such treaties are not contracts and confer no vested rights upon the tribes which are within the protection of the Constitution. They are effective, not as treaties but as acts of Congress and do not impair the power of Congress to further legislate upon the same sub-

[6]United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 34 L.E. 295; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; In re Crow Dog, 109 U.S. 556, 27 L.E. 1030; M.K.&T. Ry. Co. v. Roberts, 152 U.S. 114, 38 L.E. 377; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Gritts v. Fisher, 224 U.S. 639, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; 32 Okla. 247; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.

ject matter, even in violation of the terms of the treaties. Whatever may be the moral obligation to keep inviolate the treaties entered into with the Indian tribes, the sovereignty of the United States cannot be concluded by its own legislative enactments, should occasion arise for the further exercise of its authority.[7]

Where, however, rights have vested in the individual as distinct from the tribe, under a treaty or act of Congress, such rights are within the protection of the Constitution and cannot be divested by subsequent act of Congress.[8]

§ 7. **United States Citizenship.**—The Indian tribes were not a political part of the United States, and prior to March 3, 1901, the members of the Five Civilized Tribes were not citizens of the United States. By the General Allotment Act of February 8, 1887, every Indian born within the United States to whom an allotment was made was declared to be a citizen of the United States with all the rights, privileges and immunities thereof. The Five Civilized Tribes were excluded from the General Allotment Act, but by Act of March 3, 1901, section 6 of that Act was amended by the insertion in the appropriate place, of the words "and every Indian in Indian Territory." By such amendment United States citizenship was bestowed upon all the members of the Five Civilized Tribes.[9]

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[7]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Tobacco v. United States, 11 Wall, 616, 20 L.E. 227; United States v. Kagama, 118 U.S. 375, 30 L.E. 228; Choctaw Nation v. United States, 179 U.S. 494, 45 L.E. 291; Stephens v. Cherokee Nation, 174 U.S. 415, 43 L.E. 1041; United States v. Rogers, 4 Howard 572, 11 L.E. 1105; Ward v. Race Horse, 163 U.S. 504, 41 L.E. 244; Thomas v. Gay, 169 U.S. 264, 42 L.E. 740; Cherokee Nation v. Hitchcock, 187 U.S. 298, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941.

[8]Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Jones v. Meehan, 175 U.S. 1, 44 L.E. 49.

[9]Godfrey v. Iowa Land & Trust Co., 21 Okla. 293, 95 Pac. 792; Heckman v. U.S., 224 U.S. 410, 56 L.E. 820; Wiley v. Edmondson, 43 Okla. 7, 133 Pac. 38.

They acquired State citizenship upon the admission of Oklahoma into the Union.[10]

§ 8. **Authority of Congress, Plenary.**—The plenary authority, often called guardianship, of Congress over the tribe, tribal affairs and tribal property, *authorizes, with or without* the consent of the tribe, the dissolution of the tribe, the distribution and allotment of the tribal property and the imposition of such restrictions upon the alienation of the lands of the members, wherever and in such manner, as Congress may in its judgment deem expedient.[11]

The passage of the Act of June 28, 1898 (Curtis Act), was a valid exercise of the legislative authority of Congress over the Five Civilized Tribes.[12]

And the authority of Congress to distribute and allot the lands of the tribes in severalty to the members thereof necessarily included the authority to ascertain and declare who should constitute the membership of the tribes and share in the distribution of the land.[13]

And as a part of its plan of allotment in severalty and for the purpose of protecting the Indians in the enjoyment of their lands, it was authorized to impose upon the land of the individual members limitations or restrictions upon its alienability.[14]

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[10]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Chisholm v. Creek & Indiana Development Co., 273 Fed. (DC) 589.

[11]Lone Wolf v. Hitchcock, 187 U.S. 553, 47 L.E. 299; Cherokee Nation v. Hitchcock, 187 U.S. 208, 47 L.E. 183; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820.

[12]Stephens v. Cherokee Nation, 174 U.S. 445, 43 L.E. 1041; Cherokee Nation v. Hitchcock, 187 U.S. 294, 47 L.E. 183.

[13]Gritts v. Fisher, 224 U.S. 640, 56 L.E. 928.

[14]Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738; Williams v. Johnson, 239 U.S. 414, 60 L.E. 358; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

Nor was its power exhausted when the land was alloted in severalty subject to the restrictions it had imposed. Such allottees, with respect to their allotted lands are still tribal Indians and subject to the guardianship of Congress until that guardianship shall be terminated by Congress itself; and it is for it to say when and under what conditions that guardianship shall cease. Accordingly, it has been held that the United States may maintain suits in its own name for the purpose of enforcing the restrictions it has imposed upon the alienation of the lands of the allottees of the several tribes.[15]

It may remove the restrictions prior to the expiration of the time originally prescribed.[16]

Or extend the restricted period beyond the original term.[17]

Or impose restrictions upon lands, which were at the time subject to unrestricted alienation.[18]

And such power in Congress is not inconsistent with United States citizenship in the Indians or affected by such citizenship.[19]

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[15]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Mullen v. United States, 224 U.S. 448, 56 L.E. 834; Goat v. United States, 224 U.S. 458, 56 L.E. 841; Deming Investment Co. v. United States, 224 U.S. 471, 56 L.E. 847.

[16]Williams v. Johnson, 239 U.S. 414, 60 L.E. 358, 32 Okla. 247, 122 Pac. 485; McIntosh v. Dill, 86 Okla. 1, 205 Pac. 917.

[17]Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Tiger v. Western Investment Co., 221 U.S. 285, 55 L.E. 738.

[18]Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335.

[19]Tiger v. Western Investment Co., 221 U.S. 286, 55 L.E. 738; Heckman v. United States, 224 U.S. 413, 56 L.E. 820; Choate v. Trapp, 224 U.S. 665, 56 L.E. 941; Brader v. James, 49 Okla. 734, 154 Pac. 560, 246 U.S. 88, 62 L.E. 335; Winton v. Amos, 255 U.S. 373, 65 L.E. 684.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 41 and 59

THE CHEROKEE, CHOCTAW AND CHICKASAW NATIONS,
Petitioners,

v.

THE STATE OF OKLAHOMA, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF ATTACHED

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the law firm of Wilkinson, Cragun & Barker, of Washington, D.C., and respectfully moves for leave to file the attached brief amicus curiae in the above-entitled case, in support of the Cherokee, Choctaw and Chickasaw Nations of Indians, petitioners.

This law firm has been for many years general counsel to a number of American Indian tribes. The court below, in holding that the petitioners did not own the streambeds within their reservations, has placed a cloud on the tribal title to streambeds in Indian reservations throughout the country, title which in most cases had not been subject to doubt until now. The decision affects the tribes we represent. We have read the briefs of the petitioners and of the United States, amicus curiae, and believe the attached brief will be of additional assistance to the Court.

Respectfully submitted,

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Respondents.

BRIEF OF WILKINSON, CRAGUN & BARKER, AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS

In this brief we maintain that the petitioners should prevail. The *Holt Bank* case relied on by the court below is contrary to the main lines of cases decided by this and other courts, and should be overruled or at least held applicable only to its own precise facts. If this Court should have occasion to discuss *Holt Bank*, we urge it to do so in terms which do not imply that it is good general law.

1. The Decision Below is Contrary to the Spirit of a Long Line of Cases Decided by This Court and Other Courts

The court below did not appear to appreciate the history of the relationship between the United States and its dependent Indian tribes. Its decision is contrary to a long line of cases to the effect that the United States will

exercise the highest good faith with its Indian wards[1] and will not construe treaties to their detriment.[2]

As the court below correctly realized, the case turns on whether Congress, in conveying a vast domain to the Cherokee Nation and the other petitioners, intended to convey the streambeds within that domain. As the court recognized, Congress had power to convey the beds; it was not required to reserve them for some future state. However, the court below, believing that this Court in the *Holt Bank* case[3] set up an extremely strong presumption against any congressional intent to let the Indians have the streambeds within their reservations, held that the evidence did not overcome the presumption, so that the beds passed to the State of Oklahoma when it became a state.

We believe the lower court's decision is erroneous. We believe it is clear that Congress intended to convey the beds to the tribes, not because it said so in so many words, but because the contrary intent is so inconsistent with what the parties did say and do. Certainly Congress had no thought of reserving the streambeds for a future state: that doctrine was not known when the treaties were negotiated;[4] the grant was absolute on its face; and Congress even promised that the reservation would never be included in any future state without tribal consent.

The presumption against a grant of beds of navigable streams seems to be merely an expression of the common

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[1] E.g., *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

[2] E.g., *Worcester* v. *Georgia*, 31 U.S. 515, 582 (1832); *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392, 397-8 (1968); Department of Interior, *Federal Indian Law* 145-7 (1958).

[3] *United States* v. *Holt State Bank*, 270 U.S. 49 (1926).

[4] The doctrine seems to have been laid down in 1845 by *Pollard* v. *Hagan*, 44 U.S. 212.

feeling that certain important water-related properties—streambeds, tidelands, water use rights, water power value rights—should belong to the public, and not handed over to private interests for exploitation. No doubt the intent to convey these properties to private interests would have to be very clearly expressed indeed, as the cases say. However, the courts, including this Court, have time after time recognized that this presumption is not the same when an Indian tribe is involved. Thus Indian tribes have been held to own navigable stream beds,[5] tidelands,[6] water use rights,[7] and water power value rights,[8] when the con-

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[5] *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942) (holding that the bed of a large lake partly within the reservation belonged to the tribe, not the state, the treaty being silent as to ownership of the bed); *Donnelly* v. *United States*, 228 U.S. 243 (1913) (holding that bed of stream in middle of reservation was owned by the Indians and not the state, for criminal jurisdiction purposes); *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), *cert. den.*, 330 U.S. 827 (similar to *Donnelly*); *Fed. Ind. Law* 644.

[6] *United States* v. *Romaine*, 255 Fed. 253 (9th Cir. 1919) (holding that Executive Order impliedly included tidelands within the reservation; presumption that littoral landowners owned only to the high water line, not applicable to Indian tribes); *United States* v. *Stotts*, 49 F.2d 619 (W.D. Wash. 1930) (similar to *Romaine*); *Fed. Ind. Law* 644.

[7] *Alaska Pacific Fisheries Co.* v. *United States*, 248 U.S. 78 (1918) (holding that Congressional grant of islands as a reservation impliedly included surrounding waters as well, so tribe could exclude strangers from fishing there); *Winters* v. *United States*, 207 U.S. 564 (1908) (holding that where tribe ceded aboriginal lands, retaining a reservation, tribe also impliedly reserved right to prevent upstream owners from depleting the stream running through reservation; "equal footing" doctrine held not applicable); *United States* v. *Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939) (similar to *Winters*).

At common law the public has a right to hunt and fish on navigable waters within privately owned land, *Swan Island Club* v. *Yarbrough*, 209 F.2d 698 (4th Cir. 1954), but not within an Indian reservation: see *Alaska Pacific* above, *Metlakatla Indians* v. *Egan*, 369 U.S. 45 (1962), cf. *United States* v. *Sturgeon*, 27 Fed. Cas. 1357 (No. 16413) (D.Nev. 1879). See Hobbs, *Indian Hunting & Fishing Rights*, 32 Geo. Wash. L. Rev. 504, notes 27 and 72 (1964).

[8] *Confederated Salish and Kootenai Tribes* v. *United States*, 181 Ct.Cl. 739 (1967); *United States* v. *5677.94 Acres*, 162 F.Supp. 108

trary would have been held with respect to a private citizen. In each of these cases, incidentally, the United States held the lands for the benefit of the tribes; none of the tribes held its land in fee, as do the petitioners.

2. The *Holt Bank* Case is Contrary to the Main Line of Cases in This and Other Courts, and Should Either Be Overruled or Held Applicable Only to Its Own Facts

In the *Holt Bank* case, the Red Lake Chippewas ceded by treaties ending in 1855 all but a section of their aboriginal territory. They held the remaining section as a reservation, but there never was any formal grant of that section to them. In that section was a lake. Minnesota became a state in 1858. In 1889 the Red Lakes ceded their reservation, including the lake, to the United States, which in turn sold the land to homesteaders. The lake was drained around 1912 and the riparian homesteaders assumed that the former bed passed to them under state law. Around 1923 the United States sued for a judgment that it and not the homesteaders owned the former lake bed. This Court held that the homesteaders owned the bed.

The question was what effect the treaties, by which the Red Lakes ceded all but the one remaining tract of land, had on the stream beds in that remaining tract. If the treaties amounted to a pre-1858 confirmation of the Indians' aboriginal ownership of the bed, then Minnesota did not take title to the bed in 1858, and the United States acquired the bed from the Red Lakes in 1889. This Court said (270 U.S. at 58-59):

> "There was nothing in this [the series of treaties ending in 1855] which even approaches a grant of rights in lands underlying navigable waters; nor any-

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(D.Mont. 1958). These cases held that the tribes owned the water power values in the streams running through the reservations. The rule is contra with respect to private citizens. *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956).

> thing evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State."

But on the other hand, as this Court recognized in another case, the Red Lake tract "was a reservation within the accepted meaning of the term": [9]

> ". . . in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation." [10]

> "If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself." [11]

We note also this Court's language in the *Winans* case, that a treaty of cession "was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." [12] The Indian "right of occupancy", even when not protected by treaty or statute, has been considered by this Court to be "as sacred as the fee simple of the whites." [13]

So we have this Court saying in one decision *(Hitchcock)* that the Red Lake title is as good as if acquired by treaty, and in another decision *(Holt Bank)* saying the Red Lake title was not good enough to prevent an

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[9] *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389 (1902).

[10] Id. at 390.

[11] Id. at 390, quoting another case with approval.

[12] *United States* v. *Winans*, 198 U.S. 371, 381 (1905).

[13] *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941).

automatic loss of streambeds when the state was admitted into the Union. The possible implication is that *Holt Bank* applies to *all* reservations, no matter how good the tribe's title is.

Such an implication is irrational, of course, and we have no fears that this Court will wittingly approve any such notion. Such a holding would be contrary to the entire line of cases cited in notes 5 through 8; it would upset lease, boundaries and other rights on many reservations long regarded as settled.

But what we do fear is that this Court, in holding that *Holt Bank* does not apply to the petitioners, who own in fee, might imply that *Holt Bank* is still good law with respect to Indians whose land is, technically speaking, owned by the United States on behalf of the tribes, as is true of the Red Lakes and 90 percent of the other tribes in the country. To thus give *Holt Bank* such undeserved life would be sad news indeed. We urge that *Holt Bank* either be overruled, or held applicable only to its own facts—i.e. to a tribe which never owned a formally established reservation, and which had vacated its habitat at the time the question of bed ownership arose.

CONCLUSION

Wherefore, the judgment of the court below should be reversed, and the beds to the streams involved declared to be in the Indian tribes who are the petitioners.

Respectfully submitted,

CHARLES A. HOBBS, *Counsel for*
WILKINSON, CRAGUN & BARKER

July 28, 1969

Nos. 41 & 59

Memorandum in opposition
to motion of Wilkinson,
Cragun & Barker for leave
to file amicus curiae
brief filed on Aug 5, 1969
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In the

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OCTOBER TERM, 1969

Nos. 41 a[redacted]

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VERSUS

STATE OF OKLAHOMA, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONERS, THE CHOCTAW NATION AND THE CHICKASAW NATION

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October, 1969

PETITION FOR CERTIORARI GRANTED APRIL 21, 1969

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REPLY BRIEF OF PETITIONERS, THE CHOCTAW NATION AND THE CHICKASAW NATION

The Respondents say in effect that because in surveying the Cherokee lands the surveyors went along the north bank of the Arkansas and the Canadian rivers, and in surveying the Choctaw lands they went along the south bank of the Arkansas and the Canadian rivers, it was obvious that each tribe's perimeter went only to the high water mark and the bed of those streams remain the property of the United States.

In one of its well-known cases against Texas, Oklahoma tried a similar ploy, claiming that the navigability of Red river was evidenced by the fact that the surveyor went down the north bank and did not extend the town-

ship and section lines across the river.[1] This Court made short shrift of the posed adjudicatory powers of a surveyor:

> "A legal inference of navigability is said to arise from the action of the surveying officers who, when surveying the lands in that region, ran a meander line along the northerly bank and did not extend the township and section lines across the river. But this has little significance. The same thing was done on the Platte and other large western streams known to be unnavigable. Besides, those officers were not clothed with power to settle questions of nevigability."

In *Gauthier* v. *Morrison*, 232 U.S. 452 at 458, 459, 58 L.Ed. 680 at 684, the Court, speaking through Mr. Justice Van Devanter, said:

> "The state courts seem to have proceeded upon the theory (a) that the surveyor's action in designating and meandering the 1,200 acre area as a lake operated as an authoritative determination that it was not agricultural land, but a permanent body of water; and (b) that this determination, while remaining undisturbed by the Land Department, took the land without the operation of the settlement laws, including the homestead law. But in this there was a misconception of the authority of the surveyor. He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws. All that he was to do in that regard was to note and report its character, as it appeared to him, as a means of enlarging the sources of information upon that subject otherwise available."

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[1] *State of Oklahoma* v. *State of Texas*, 258 U.S. 574, 585.

In *Barden* v. *Northern P. R. Co.*, 154 U.S. 288, 292, 320, 38 L.Ed. 992, 993, 999, 14 Sup.Ct.Rep. 1030, in disposing of a contention that the lands there in question had been determined and reported by the surveyor as agricultural and not mineral, and that the determination and report remained in force, the Court said:

> "But the conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon. Information of the character of all lands surveyed is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject."

We say as the Court said in *Gauthier* v. *Morrison*:

> "But in this there was a misconception of the authority of the surveyor. He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, and to classify it within and without the operation of particular laws."

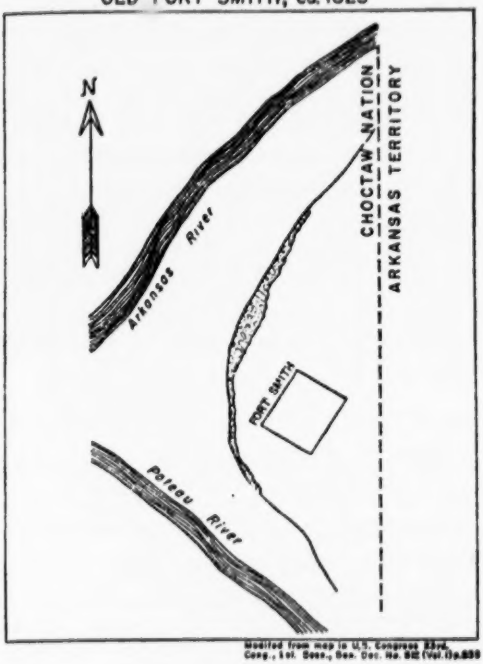
and as the Court said in *Barden* v. *Northern P. R. Co.*:

> "The conclusive answer to such alleged determination and report is that the matters to which they relate were not left to the Surveyor General. Neither he nor any of his subordinates was authorized to determine finally the character of any lands granted, or make any binding report thereon . . . they were not clothed with

authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force."

The speciousness of Oklahoma's labyrinthine exposition on the surveys made along the Arkansas river is profiled at pages 60 and 61 of its brief. There, in arguing that a surveyor's convenience in going down one bank of the other bank of the river should be accepted as a proper construction of the treaties of 1820 and 1830 between the United States and the Choctaws, it discusses the phrase in the Treaty of 1855 (a treaty which has not the least relevance to the issues in this case), "Beginning at a point on the Arkansas river 100 paces east of Old Fort Smith, where the western boundary line of the State of Arkansas crosses said river," saying: "The beginning point is *on* the Arkansas River and not *in* the River or *on the opposite bank* from Fort Smith." The phrase originated in the Treaty of 1825 by which the Choctaws retroceded to the United States that portion of the lands ceded to them by the Treaty of 1820 in what is now Arkansas. The purpose of the Treaty of 1825 was to establish a new east and west boundary between the United States and the Choctaws and the line so established is now the boundary between the State of Oklahoma and the State of Arkansas. It was not in the least the purpose of the Treaty of 1825 to establish the northeast corner of the Choctaw lands or to define the south bank of the Arkansas as the northern boundary of the Choctaws in the lands west of those with which that treaty was concerned. Indeed, it will be observed from the following illustration that the Arkansas river cannot be reached by going east from old Fort Smith.

OLD FORT SMITH, ca. 1825



Modified from map in U.S. Congress 33rd. Cong., 1st. Sess., Sen. Doc. No. 512 (Vol. II), p. 559

The Respondents say at page 70 of their brief: "Viewed through the eyes of a drafter of legal descriptions the land descriptions in the treaties, standing alone, actually exclude the river bed." But these treaties are not to be "viewed through the eyes of a drafter of legal descriptions," for, as this Court said in *Jones* v. *Meehan*, 175 U.S. 1, 10, 11:

> ". . . it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known

> to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language, and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

and in *Choctaw Nation* v. *U. S.*, 119 U.S. 1, 27, 28:

> "The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules, framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.
>
> "The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."

The Respondents profess not to be able to find in the facts surrounding the removal of the Choctaws from the southern states to the wild lands in the west a "public exigency" or a "compelling public purpose" for the United States to include the avulsed beds and the soil and the minerals underlying the navigable portion of the Arkansas

river to be included in its grant to the Choctaws. At pages 76 and 77 of their brief they quote the grandiloquence of a Congressman Mitchill in the debate on the Act erecting Louisiana into Two Territories and Providing for the Temporary Government Thereof:

> "That masses of virgin silver and gold glitter in the veins of the rocks which underlay the Arkansas itself, and mingle with the minerals near certain other of its streams, and offer themselves to the hand of him who will gather, refine, and convert them to use."

"Clearly," urge the Respondents, "a grant by the United States to any Indian tribe or tribes of a national asset of such value and importance should not be lightly inferred." It seems somewhat illogical that the United States would want to reserve to itself the silver and gold under the deep, treacherous and hard to-get-at navigable portion of the river while giving to the Choctaws the silver and gold that might be found in the uplands and in the shallower, safer stretches of the river.

If the Government were granting the uplands to the Choctaws there would be no plausible reason why it should reserve to itself the avulsed beds of the navigable portion of the river. And if it were granting to the Choctaws, as it did, all of the minerals in the uplands, then it would have no plausible reason for reserving to itself the minerals beneath the navigable portion of the Arkansas; and if it were granting to the Choctaws, as it did, the soils of the uplands, it had no plausible reason for reserving to itself the soils underlying the waters of the navigable portion of the Arkansas. None of these were an aid to the navigation

of the Arkansas. And that is the only need that the Government had for the river and it had that not by virtue of any reservation in a treaty but by the commerce clause of the Constitution.

In *Donnelly* v. *United States*, 228 U.S. 242, 33 S.Ct. Rep. 449 (1913), Donnelly was convicted of murder in the Circuit Court of the United States for the Northern District of California. The indictment charged him with the murder of one Chickasaw, an Indian, within the limits of an Indian reservation known as the Extension of Hoopa Valley Reservation in the Northern District of California. The evidence, as disclosed by the opinion of the Court, tended to show that Chickasaw was shot through the body and mortally wounded while he was in or near the edge of the water of the Klamath river. The conviction was based upon the laws which provided that certain general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States "which extend to the Indian country."

The Hoopa Valley Reservation was first established in 1876. In 1891 it was extended to include "a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of the said Hoopa Reservation to the Pacific ocean."

In 1850 California passed an act adopting the common law of England as a rule of decision in all courts of that state. The effect of which was to transfer to all riparian owners all the property of the State, if any she had, in the non-navigable streams and the soils beneath them. By statute in 1891 California enumerated the navigable rivers

within the State. The Supreme Court of that State holds that act to be exclusive so that no other rivers are navigable under the laws of California. The Klamath river was not among those enumerated.[2]

This Court inquired, does the reservation include the bed of the Klamath river? And in answer it said: [3]

> "The descriptive words of the order 'a tract of country 1 mile in width on each side of the Klamath river and extending,' etc. It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of this language requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of 1 mile on each side of the river, and at the same time to exclude the river."

The Respondents say at page 8 of their brief that: "The United States intended eventually to include the area ceded to its ward in a future Territory or State." And that: "The Cherokees and Choctaws were aware of these policies, powers and rights when they made the treaties." And at page 44 of their brief they say: "The leaders of these Indian tribes who negotiated the treaties with the United States are not shown to be ignorant and uneducated savages," and by way of illustration point out that Patrick J. Hurley, a Choctaw, served with distinction as Secretary of War. Perhaps it would have been more edifying had they gone further and revealed that Patrick J. Hurley was a Choctaw

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[2] Second column, 33 S.Ct. Rep. 455.

[3] 33 S.Ct. Rep. 453, 454.

Indian of only 1/32nd blood and that he was Secretary of War 120 years after the Treaty at Doak's Stand was signed.

The Respondents' understanding of the cultural attainments of the Choctaws and their ability to deal as equals with such people as General Andrew Jackson and General Thomas Hinds, who negotiated the Treaty of 1820 on behalf of the United States, and Secretary of War Eaton and General Coffee, who negotiated the Treaty of 1830 on behalf of the United States, is somewhat at odds with the fact that the Commissioners for the United States communicated with the Indians through interpreters employed by them, and the fact that of the 103 Indians who signed the Treaty of 1820 on behalf of the Choctaw Nation, 99 signed by mark, and that of the 176 Indians who signed the Treaty of 1830 on behalf of the Choctaws, 166 signed by mark. In *Choctaw Nation* v. *United States,* 7 S.Ct. Rep. 90, this Court spoke of the Choctaws and the Cherokees as an "unlettered people" saying of the Treaty of 1830:[4]

> "It is notorious as a historical fact, as it abundantly appears from the record in this case, that great pressures had to be brought to bear upon the Indians to effect their removal, the whole treaty was evidently and purposely executed, *not so much as to secure to the Indians the rights for which they had stipulated, as to effectuate policy of the United States in regard to their removal.*
>
> * * * * * * *
>
> "It is, perhaps, impossible to interpret the language of this instrument, considered as a contract between parties standing upon an equal footing and dealing at arm's length . . ."

[4] 7 S.Ct. Rep. at 96.

At page 57 of their brief the Respondents talk of the treaty which General Andrew Jackson and General Thomas Hinds negotiated with the Choctaws in 1820 at Doak's Stand. Although the "equal footing-implied trust" doctrine was not to be enunciated until 1845 in *Pollard* v. *Hogan* (3 How. 212), and modified in 1850 by *Goodtitle* v. *Kibbee* (9 How. 470, 478), they say it was established law in 1820; that by the treaty of that year the United States agreed that it would forever secure the Choctaws from all laws not inconsistent with the Constitution; and, as no definite declaration concerning the waters under the navigable portion of the Arkansas river was made in that treaty ". . . it then follows that a construction of this treaty that it covered lands beneath navigable waters would result in an inconsistency with the laws of the United States—and that is expressly prohibited by the language quoted above." This sophistry, now advanced for the first time by learned counsel, was not to be found in the law books of those times and much less in the minds of the ". . . weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States."[5] It has no kinship to the suasions of such spokesmen for the United States as General Andrew Jackson:

> "Brothers, you have long dwelt upon the soil you occupy; and in early times, before the white man kindled his fires too near to yours, and by settling around,

[5] *Jones* v. *Meehan*, 175 U.S. 1, 10, 11.

narrowed down the limits of the chase, you were, though uninstructed, yet a happy people. Now, your white brothers are around you; they compass you about every where; states have been created within your limits, which claim a right to govern and control your people as they do their own ciitzens, and to make them answerable to their civil and criminal codes. Your great father has not the authority to prevent this state of things, and he now asks if you are prepared and ready to submit yourselves to the laws of Mississippi; make a surrender of your ancient laws and customes, and peaceably and quietly live under those of the white man.

"Brothers, listen: to these laws, where you are, you must subject, there is no preventative, no alternative. Your great father cannot, nor can Congress, prevent it; the states only can. What then? Do you believe that you can live under those laws? That you can surrender all your ancient habits, and the forms by which you have been so long controlled? If so, your great father has nothing to say or to advise. He has only to express a hope, that you may find happiness in the determination you shall make, whatever it may be. His earnest desire is, that you may be perpetuated and preserved as a nation; and this, he believes, can only be done and secured by your consent to remove to a country beyond the Mississippi, which, for the happiness of our red friends, was laid out by the Government a long time since, and to which it was expected, ere this, they would have gone. Where you are, it is not possible you can live contented and happy. Besides, the laws of Mississippi which must operate upon you, and which your great father cannot prevent, white men, continually intruding, are with difficulty kept off your lands, and every day inconveniences and difficulties continue to increase around you.

* * * * * * *

"Brothers, listen: The only plan by which this can be done, and tranquillity for your people obtained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a Nation, free from all interruption.

* * * * * * *

"Peace invites you there, annoyance will be left behind; *within your limits, no State or Territorial authority will be permitted;* intruders, traders and above all, ardent spirits, so destructible to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission."[6]

The Respondents urge that the Choctaws should have demanded an expression in some law, some treaty, or some patent, that the avulsed beds and the soil and minerals underlying the navigable portion of the Arkansas river were to be included in the lands ceded to them by the Treaties of 1820 and 1830. They hypothesize the absence of a specific demand with the absence of a "public exigency."

They put the shoe on the wrong foot. The agreement that the United States made by the Fourth Article of its treaty with the Choctaws in 1830 ". . . that no part of the land granted to them shall ever be embraced in any Territory or State . . .," indisputably evinced a purpose not to hold the avulsed beds over and the soil and minerals in the navigable portion of the Arkansas river for the benefit of a future state. The caveat in *United States* v. *Holt State*

[6] Senate Documents Indian Removals 23d Congress 1st Session, Document 512 (Vol. II).

Bank,[7] is that had the Government wanted to retain the avulsed beds and the soil and minerals underlying the navigable streams in those lands for any purpose, it should have formally set them apart from its grant.

Even though the United States did admit a state to the Union which embraced the area ceded to the Choctaws, their rights to the avulsed beds and the soil and minerals underlying the navigable portion of the Arkansas river in Oklahoma had become vested in them by the Treaties of 1820 and 1830, and, as this Court said in *Holt State Bank*, 270 U.S. 49, 55:

> ". . . such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keokuk, 94 U. S. 324, 338, 24 L. Ed. 224; Shively v. Bowlby, 152 U. S. 1, 47, 48, 57, 58, 14 S. Ct. 548, 38 L. Ed. 331; Scott v. Lattig, 227 U. S. 229, 242, 33 S. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Port of Seattle v. Oregon & Washington R. Co., 255 U. S. 56, 63, 41 S. Ct. 237, 65 L. Ed. 500; Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 83-85, 43 S. Ct. 60, 67 L. Ed. 140."

The Respondents suggest that the Choctaw and Chickasaw Nations should have come into court years ago to assert their rights to the bed of the navigable portion of the Arkansas river. The right of the Choctaw and Chickasaw Nations to bring an action in their own names was not established until 1951 in *Choctaw and Chickasaw Nations* v. *Seitz*, 193 F.2d 456. Even at that late date the Honorable

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[7] 270 U.S. 49, 58.

Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, and whose decisions are recognized as leading expositions on Indian law, dismissed an action to establish title and recover the possession of land on the ground that the tribes, being still under the tutelage of the Government, had no independent standing before the courts. The Tenth Circuit reversed Judge Rice's decision in *Choctaw and Chickasaw Nations* v. *Seitz*. Since then, this case was the first opportunity the Choctaws and Chickasaws had to assert their claim.

In the concluding paragraph of their brief the Respondents say that prior to the admission of Oklahoma as a state ". . . the United States secured the consent of petitioners to relinquishment of tribal ownership of lands and to the allotment of the lands to the Individual Tribal Members and to United States Citizenship." Without some clarification the brevity of the summation of the events which occurred between 1898 and 1907 is misleading.

By the Act of September 25, 1902 (32 Stat. 641), the Choctaws and Chickasaws did agree to allot land in value to three hundred and twenty acres of the average allotable land of the Choctaw and Chickasaw Nations to each member of the tribes and land equal in value to forty acres of the average allotable land to each Choctaw and Chickasaw freedman. All lands that were not allotted were to remain the property of the tribes.

The Act of April 6, 1906 (34 Stat. 137), provided that the lands belonging to the Choctaw and Chickasaw Tribes should not become public lands nor property of the United

States but should be held in trust by the United States for the use and benefit of the Indians respectively comprising each of those tribes. This Act also provided that the tribal existence and the tribal governments of the Choctaw and Chickasaw Tribes should continue in full force and effect for all purposes authorized by law. That provision is still in full force and effect.

The tribal lands that were not allotted to the individual members were retained by the United States as trustee. The lands involved in this action are a part of those unallotted lands and are held in trust by the United States for the benefit of the Choctaw and Chickasaw Nations.

In *Shively* v. *Bowlby*, 152 U.S. 1, at page 48, the Court enunciated the rule that Congress has the power to make grants of lands below high water marks on navigable waters in any territory of the United States, (a) whenever it becomes necessary to do so in order to perform international obligations, or (b) to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or (c) to carry out other public purposes appropriate to the objects of which the United States holds the territory. At page 50 the Court defined its expression "whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations" as "*in case of some international duty,*" and it defined its expression "to effect the improvement of such lands for the promotion and convenience of commerce . . . among the several states, and to carry out other public purposes

appropriate to the objects of which the United States hold the territory" as *"a public exigency."* The Court made its phrase "public exigency" synonymus with its phrase *"public purposes appropriate to the objects of which the United States hold the territory."* The removal of the Indians from the southern states to the lands west of the Mississippi was a public purpose appropriate to the objects for which the United States held the territory.

The "Indian Removal Act" of May 28, 1830, making it ". . . lawful for the President of the United States to cause so many of any territory belonging to the United States, west of the river Mississippi, not included in any State or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided unto a suitable number of districts, for the reception of such tribes of Nations of Indians as may choose to exchange the lands where they now reside and remove there . . ." was a proper method through which the United States accomplished a purpose appropriate to the object for which it held the territories.

CONCLUSION

In the light of the circumstances existing at the time the treaty with the Choctaws was entered into and the objects that the United States and the Choctaws were desirous of effecting, it is obvious that the United States had no need of anything but a navigation easement on the streams in the Choctaw lands. It did not need the bed of streams that would re-emerge by avulsion. It did not need the minerals that might underlie the beds of the streams

in the Choctaw lands. It did not need to reserve the soil of the beds of navigable streams and the minerals underlying them in trust for a future state because it had guaranteed to the Choctaws ". . . that no part of the land granted to them shall ever be embraced in any Territory or State."

Viewed against the background of its efforts to remove all Indians from the southern states on to lands west of the Mississippi, it is apparent that in its treaty with the Choctaws the United States reserved nothing more than a navigation easement and the right to establish post offices, military post roads and posts as it may consider necessary.

Respectfully submitted,

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No. 59

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IN THE

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October Term, 1969

CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,

Petitioner,

v.

STATE OF OKLAHOMA, ET AL.,

Respondents.

Petition for Certiorari Filed March 3, 1969
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REPLY BRIEF OF PETITIONER

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REPLY BRIEF

The United States Government when it relocated the Cherokee Nation in the land in what is now eastern Oklahoma, granted to the Tribe fee simple title to all the land, including the river bed underlying the navigable portion of the Arkansas River. This was done by treaties and patent which vested title to the land encompassing the Arkansas River and which did not express any intention nor make any reservation with reference to retaining title to the river bed. As is set forth at page 8 of the brief of the petitioner the reason that the United States

acquired the aboriginal title from the Osage Indians, the purpose for the treaties and patent, was the removal of the Cherokee Nation from its lands in the East and the reestablishment of the Tribe in these new lands. Through these treaties and patents, the intent of Congress was to give to the Cherokee Nation full sovereignty, full autonomy to pass its own laws, not inconsistent with the Constitution of the United States.[1] See, for example, Article 5 of the Cherokee Treaty of 1835.

The United States fully intended and contemplated a completely separate and independent Nation on the acquired lands, as is demonstrated by the language contained in the the treaties that no state would be formed from such lands without its consent.[2] Accordingly the United States in its treaties agreed to vest the Cherokee Nation with fee simple title to all the land conveyed. The treaties with the Cherokee Nation specifically state the United States would possess and guarantee forever to the Indians the land in question and title to such land would be evidenced by the execution of a patent. The

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[1] See *Cherokee Nation v. Georgia,* 30 U.S. [5 Pet.] 1 and *Worcester v. Georgia,* 31 U.S. [6 Pet.] 515. These early cases point out the nature and extent of the sovereignty of the Cherokee Nation in its lands in the East. Certainly in any treaties with the United States, the Cherokee Nation would not have accepted anything less than what it orginally possessed. Nor would the United States offer less in view of its obligation to the Nation.

[2] The unique character of the Cherokee Nation's lands, has long been recognized. "Indeed it is open to serious doubt whether that large tract of land, known distinctively as the Indian Territory, is a territory of the United States within the meaning of the act . . . . A reference to some of the treaties under which it is held by the Indians indicates that it stands in an *entirely* different relation to the United States from other territories, and that for most purposes it is to be considered as an *independent* country." *Atlantic and Pacific R. Co. v. Mingus,* 165 U.S. 413, 435-438. (Emphasis added.)

Cherokee patent executed in 1838 was the first such patent. At the time of the grant to the petitioner the United States had no intention to retain title to the bed of the Arkansas River. The right of the United States to maintain a military garrison and to regulate commerce was not affected.

The brief of the respondents is voluminous, repetitious and has as its only apparent purpose confusion of the issues. The brief raises many matters which have no bearing on the issue before the Court and other matters which are not correctly stated.[3] The arguments of the respondents are not new but have been heard by this Court before and rejected.

The State of Oklahoma as a matter of State policy has attempted to declare every river within its boundaries navigable, so that it could assert title under the equal footing-implied trust doctrine upon its admission to the Union. See *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77; *Oklahoma v. Texas*, 258 U.S. 583; *United States v. Champlin Refining Co.*, 156 F.2d 769 (10th Cir. 1946). In all previous cases the principal question was whether the river in question was in fact navigable, *e.g.*, the Red River. In this case navigability is not in issue. All parties have agreed that the river was navigable at the place in issue at the time of grant. In all other cases previously considered, the Court did not have before it a question of fee simple title.

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[3] It is difficult to meet and correct the many inaccuracies for to do so would simply cause the petitioner to follow the respondents into the forest of irrelevancies which they have cultivated.

The issue, in this case, simply stated is, what title did the Cherokee Nation receive under its treaties and patent executed in the 1820's and 1830's to the bed of the river, some seventy-odd years before Oklahoma was taken into the Union. The State of Oklahoma insists that the Cherokee Nation received no title, that under the equal footing-implied trust doctrine the United States retained title and it passed to Oklahoma upon its admission to the Union.

The respondents rely for support on the following propositions:

I. EQUAL FOOTING-IMPLIED TRUST DOCTRINE

The respondents set forth at great length historical data to show that the purpose of the Louisiana Purchase Treaty was the establishment of new states in the West. The respondents also cite correspondence from President Jefferson setting forth his hope of the creation of future states. (Respondents' Brief at pp. 12-14). The respondents contend that this hope requires an application of the equal footing-implied trust doctrine.

In *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, the State of Oklahoma, an intervenor in the suit, raised the same contention asserting that the river at the *locus in quo* was navigable and title to the land beneath the river therefore passed to the State under the equal footing-implied trust doctrine in view of the purpose of the Louisiana Purchase Treaty. This Court said:

> We do not think the declared purpose of the Louisiana Purchase Treaty with France, that statehood should be ultimately conferred on the inhabitants of the territory purchased, relied on by the appellants,

varies at all the principles to be applied in this case. *Id.* at 85.[4]

From the above quoted language, it is clear that whatever the intention of Congress in ratifying the Louisiana Purchase Treaty and whatever the hope of President Jefferson might have been, once it was the exclusive sovereign, Congress could part with the land as it deemed necessary and proper, in accordance with the guidelines first laid down in *Shively v. Bowlby*, 152 U.S. 1. The intention of Congress as expressed in the later treaties and patent granting title to the petitioner would be paramount. The intention of Congress is manifested in the treaty provisions which state that:

> The United States agree to possess the Cherokee, and to guarantee it to them forever, and that guarantee is solemnly pledged, of seven millions of acres of land, to be bounded as follows, viz:. . . See *e.g.*, Article 2 Cherokee Treaty of 1828.

The respondents in their brief assert that it was the intention of Congress to establish an Indian state which would have "a political connexion with the United States." See Respondents' Appendix 8. Accordingly Congress intended to retain title so that that state would enter on an equal footing with the original states. The House Reports which are cited in the respondents' appendix plainly indicate the hope of an Indian State governed and controlled by Indians. Such state would be more in the nature of a foreign state. Certainly Oklahoma would not have been the beneficiary of such a

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[4] It should be pointed out that in that case the crucial issue for determination was whether the river was navigable. The Court determined that the river was in fact non-navigable and it therefore applied the common law principles relating to riparian landowners. See also *Blue Jacket v. Johnson County*, 72 U.S. [5 Wall] 667.

presumption, it would have been the Indians themselves. In any event this entire argument is simply not relevant. Clearly Congress did not establish Oklahoma as a state until 1907.

To accept the respondents' position would be to admit that Congress could not convey title to the land under navigable waters as long as there was the possibility, no matter how remote, that a state might be created.[5] Obviously, this is not true. Congress may dispose of the title to property as it deems fit and proper in the national, or the public interest. See Cherokee Brief at pp. 19-20. The attempt of the respondents to distinguish *Moore v. United States,* 157 F.2d 760 (9th Cir. 1946), *Alaska Pacific Fisheries v. United States,* 248 U.S. 78 as merely "fishing" or "specific boundary" cases simply ignores the plain language contained in these cases.

The respondents and the lower courts simply have failed to grasp the meaning and purpose of the "equal footing-implied trust doctrine." The respondents read the doctrine as an absolute rule of conveyancing. Plainly this is not so. As is pointed out in the Cherokee Brief at pp. 17-19, the equal footing doctrine applies to political equality, sovereignty. And as was stated by Mr. Justice Reed in *Alabama v. Texas,* 347 U.S. 272, 275 the "equal footing doctrine does not wipe out economic diversities" and "does not affect Congress' power to dispose of federal property." When Oklahoma entered the Union, it did so subject to whatever grants Congress may have authorized. See Oklahoma Enabling Act, 34 Stat. 267

[5] In its Amicus Brief, the Solicitor General notes that in most situations where the equal footing-implied trust doctrine was called into play statehood was imminent, (A.C. Brief at pp. 16, 23), that is, that a specific territory had been designated for inclusion in the Union and it was accomplished in a relatively short time, certainly not seventy years later.

[June 16, 1906]. See Cherokee Brief at p. 26. In this case now before the court, Congress had granted title to the land underlying the Arkansas River to the petitioner.

The respondents' examination of the early equal footing-implied trust cases serves no useful purpose other than to highlight what the petitioner has already articulated and, that is, that the United States did not obtain title to the bed of the navigable waters from the states when they entered the Union. Title to this land at the time of the Revolution was in the hands of the states and remained there, subject to the commerce clause. The United States could not grant title to such lands *after* statehood. However, the United States could grant title to such land which it *owned exclusively* (not held in trust as in *Pollard v. Hagan*, 44 U.S. (3 How.) 212) before statehood. *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471. See Cherokee Brief at p. 17.

As part of their equal footing-implied trust argument, the respondents set forth the Larrabee letter at pages 19-20 and assert that it is a supporting Executive determination. The Government in its Amicus Brief effectively nullifies this argument. (A.C. Brief at pp. 25-28). The Cherokee Nation cannot be deprived of its title by an interpretation of the equal footing-implied trust doctrine without any consideration of the specific treaties and patent. The Government having vested title in the Cherokee Nation to the land in question by valid treaties and patent, it could not be divested by a mere exchange of correspondence between two officials in the Executive branch of government.

At the time the United States entered the treaties with the Cherokee Nation it granted and guaranteed fee simple title to the land conveyed, without exception or reservation. The Government further promised that it would form no state on the lands ceded without the consent of the Cherokee Nation. This language is a clear

articulation that what occurred in Georgia would not occur in these new lands. Such treaty provisions clearly refute any inference that the United States retained title to the bed of the Arkansas River or any other navigable streams which might be circumscribed by the metes and bounds description in the grant.

II. PUBLIC PURPOSE

The respondents next contend that the United States could not have granted title to such land because there was no public purpose for such a grant to the Cherokee Nation. Drawing upon the language in *Shively v. Bowlby*, 152 U.S. 1, the respondents assert that the granting of title to the Nation was not a proper public purpose. (Respondents' Brief at pp. 25-29, 47-49). To support this contention respondents state "The Oklahoma Supreme Court efficiently disposed of that 'public purpose' contention over thirty-five years ago in the case of *Vickery v. Yahola Sand and Gravel Co.*, 12 P.2d 881." The respondents infer that the Cherokee Nation and the Federal Government could have intervened as the state did. The efficacy of a state court decision in similar matters has been the subject of this Court's comment on numerous occasions. A State Supreme Court is not the proper judicial body to pass upon the public purpose of a conveyance by the United States Congress. In *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 87 this Court stated:

> As to such a grant, the judgment of the state court does not bind us, for the validity and effect of an act done by the United States is necessarily a Federal question. The title of the Indians grows out of a Federal grant when the Federal Government had complete sovereignty over the territory in question. See also *Oklahoma v. Texas*, 258 U.S. 574.

Indeed, the Court of Appeals in its decision left the question of public purpose unanswered. See J.A. at 141a. Certainly, it is a valid public purpose for the Government to convey title to the bed of a navigable stream to an Indian Tribe in order to accomplish the relocation of the Indian Tribe, pursuant to an Act of Congress [Indian Exchange and Removal Act, 4 Stat. 411 (1830)], to obtain the Tribe's former lands; to avoid future conflict and contact with the Tribe by white settlers; to preserve the Tribe's sovereignty, autonomy, and way of life; and to promote domestic peace and tranquility.

It is difficult for the petitioner to understand, particularly in the times in which we live, how there could be a higher public purpose than that expressed by Congress, reflecting the will of the people, in the context of its action, when considered in reference to its many previous promises given and broken. The validity of the public purpose simply cannot be denied. In *United States v. Rickert,* 188 U.S. 432, this Court, in a tax case involving an Indian, found a public purpose in safeguarding and advancing a dependent people. Accord *Creek County v. Seber,* 318 U.S. 705.

Moreover, the Court need not reach the public purpose of the grant. As was pointed out in *Shively v. Bowlby,* 152 U.S. 1, and reiterated in *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, public purpose is a consideration only when there has been a grant to land under the navigable waters during the period of territorial government. In this case there never was a period of territorial government on the lands owned by the petitioner. It is well settled that the United States Government may dispose of property in its public domain without limitation. "Congress not only has legislative power over the public domain, [Louisiana Purchase territory was public domain] but it also exercises the

power of the proprietor therein." *Alabama v. Texas*, 347 U.S. 272. (*Per Curiam* opinion)

III. APPLICATION OF HOLT STATE BANK

The respondents at page 5 of their brief state that "The decision in *United States v. Holt State Bank*, 270 U.S. 49, (1925), *under a fact situation similar to our case*, recognizes the rule cited in *Shively v. Bowlby*. . ." This statement is not correct. *Holt State Bank* is not a similar case, the facts and legal principles are distinguishable. Even the Court of Appeals was more prudent in its description of the case, when it said "Although *Holt State Bank* was not concerned with a situation such as we have here . . ." J.A. at 139a. In *Holt State Bank*, this Court said:

> *An affirmative disposal is not asserted*, but only that the lake and therefore the lands under it were within the limits of the Red Lake Reservation when the state was admitted.
>
> *There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein*, nor any attempted exclusion of others from use of navigable waters. The effect of what was done to reserve in a general way for the continued occupation of the Indians what remained of their *aboriginal* territory. Id. at 58 (Emphasis added.)

In the petitioner's case there was an affirmative disposal of fee simple title to all the land within the metes and bounds description which circumscribed the navigable portion of the Arkansas River. The United States Government prior to the admission of Oklahoma to the Union had already granted fee simple title to the Chero-

kee Nation.[6] The Court of Appeals and the respondents have ignored the distinction between fee simple title and aboriginal Indian title. See Cherokee Brief at pp. 30-32. Clearly the affirmative grant of fee simple title, together with the express promise that no state would be formed without its consent, should in and of itself evince an intention to depart from the established policy of holding such lands for the benefit of future states.

Petitioner submits that the *Holt* Court presented with the facts of this case would find title to river bed in the hands of the petitioner.

IV. FEE SIMPLE TITLE

The respondents attempt to buttress their arguments by asserting that the petitioner did not receive fee simple title but merely a conditional grant (Respondents' Brief at page 5) and that the United States retained residual title to all the lands granted (Respondents' Brief at page 89). This assertion is founded upon the words found in its patent "shall revert to the United States if the Cherokee Nation ceases or abandons the same." It should be

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[6] The respondents on p. 33 ftn. 2 assert that the holding in *Oklahoma v. Texas*, 258 U.S. 514 is determinative. The respondents rely on the *dicta* in the case to the effect that if the Red River were navigable it would pass to the state under the doctrine of equality. The Court in that case did not have before it the specific treaties and patent granting fee simple title involved in this case, nor did the Court have before it the other circumstances demonstrating intent which are raised in this case. It should further be noted that the land in question was within the territory of Oklahoma, not Indian Territory.

emphasized that the argument of the respondents is purely an academic one because the condition upon which the reversion would take place has not occurred. By statute the tribal status of the petitioner has been preserved and so too the tribal title. See Cherokee Brief at pp. 26-27.

Until now, the fee simple nature of the grant to petitioner has been unchallenged. The United States in its treaties with the petitioner did not establish a reservation held by use and occupancy. It conveyed fee simple title. See *United States v. Creek Nation*, 295 U.S. 103.

Further, this Court has considered the nature and quality of the Cherokee title on many occasions. See, *e.g.*, *United States v. Creek Nation*, 295 U.S. 103; *Atlantic and Pacific R. Co. v. Mingus*, 165 U.S. 413. One of the earliest cases was *Holden v. Joy*, 84 U.S. [17 Wall.] 211 (1872),[7] involving a patent issued in 1867 to land formerly held by the Cherokee Nation. The land was part of the 800,000 acres conveyed by the Patent of 1838. In that case the Supreme Court examined the same treaties of 1828, 1833 and 1835 and the patent of 1838 as are presented here. The Court agreed that the Cherokee Nation had fee simple title.

The right of reversion which is set forth in the patent is no more than the articulation of the law of escheat whereby the sovereign provides for the return of title if for some reason there is an obstruction in the course of

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[7] See also *Cherokee Nation v. United States*, 9 Ind. Cl. Comm. 162 (1961).

descent.[8] Escheat attaches to all fee simple titles and in no way minimizes the quality of the title.

V. GROUNDS FOR RETAINING TITLE

The respondents contend that there were compelling reasons which would negate any intention to convey the land in question to petitioner, among them valuable mineral deposits, especially salt, and the need for a public highway to reach the lands north and west. (Respondents' Brief at pp. 75-82). The fact that the fee title to navigable waters was conveyed to the petitioner would in no way conflict with the trust to hold them for the public for navigation. See *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). In the treaties the Government retained jurisdiction to regulate commerce on the river and it retained permission to maintain its military garrison at Gibson Cantonment. The rights of the public were fully protected by these reservations. Throughout their brief the respondents imply that if title to the river were vested in the petitioner and not in the state (under the equal footing-implied trust doctrine) the authority and power of the United States could somehow be compromised. Such an inference is absurd; no matter who

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[8] The escheat nature of these conditions was appreciated by the petitioner and by Congress. "The reversion of the lands to the United States referred to is but the reiteration of the old doctrine of escheats; a condition that attaches to all fee-simple titles to lands, and the special provision for it in the case of the Cherokees is more of an admission than otherwise that free Cherokee Nation hold its lands in fee simple." Memorial of Indian Delegates signed by representatives of the Cherokee, Choctaw Creek and Shawnee Tribes, referred to the Committee on Territories Misc. Doc. No. 41, 46th Cong. 2d Sess. Feb. 16, 1880.

holds title to the riverbed, the petitioner or the state, the rights and power of the United States are precisely the same.

The respondents seek to find comfort in the fact that that the bed of the river was thought valuable for mineral deposits, especially salt. (Respondents' Brief at pages 7, 76) If such fact were true, and, indeed even the Court of Appeals could find no value in the river bed until now (J.A. 146a), the basic need for salt would furnish strong reason for the Government conveyance to the Indians. Further, if the retention of valuable mineral rights was predominant, it would have been logical for the Government to exclude from the Nation the mineral rights under all the land conveyed. The answer is obvious the Government did not reserve and did not intend to reserve anything in these pervasive grants other than the minimum necessary to maintain the rational interest.[9]

None of the reasons asserted by the respondents militates against the conveyance of fee simple title to the petitioner.

Not only does the language of the treaties and patent executed with the petitioner, in and of itself, demonstrate a clear intent on the part of Congress to convey fee simple title, but the entire history of the Government's dealing with the petitioner, the contemporaneous circumstances, the prior condition and way of life of the petitioner all evidence the intent of Congress to establish the petitioner in a permanent home over which the Cherokee Nation would exercise full autonomy. This

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9 "The responsibility of Congress is to utilize the assets that come into its hands as sovereign in a way that *it* decides is best for the future of the Nation". Concurring opinion *Alabama v. Texas*, 347 U.S. at 277. (Emphasis added.) See also ftnte. 6 Cherokee Brief p. 17.

political autonomy was to be insured by granting fee simple title without reservation or exception to all the land within the metes and bounds description.

The Arkansas River, navigable as it is, is completely circumscribed by the description. One portion of the Arkansas River, above the Canadian is surrounded on both sides by the land of the Cherokees. Yet respondents argue ineffectually on pp. 73-74 that there was clear exclusion of the Arkansas River. This is a perversion of the treaty. By treaty the westerly line was to be run up and between the Canadian and the Arkansas so as to make up the requisite seven million acres [amended in 1833 the grant moved the westerly line North of the Creek country.] Clearly any line so drawn would completely envelop the Arkansas River, as any map will demonstrate. A construction as is contended for by the respondents would produce the unreasonable result of splitting into two pieces a tract of land which existed as an undivided whole, subject only to the power of Congress to regulate commerce and navigation, an easement as it were, and which in reason must be considered to have been conveyed as a single tract and not to have been split into separate parts with a thin wedge of land between. *Lewis v. East Texas Finance Co.*, 136 Tex. 149, 146 S.W. 2d 977, 981 (1941).

The onus is on the grantor in such a situation to reserve or exclude those portions. Otherwise, the land passes in toto to the grantee. See *Shell Oil Petroleum Corp. v. Ward*, 100 F.2d 778 (5th Cir. 1939). As the Government argues, the portion of the Arkansas River which forms the boundary between the two petitioners was completely surrounded by land to which the Government had granted fee simple title without reservation. When a river is a boundary line, the rule is stated in *Iowa v. Illinois*, 147 U.S. at 7: "When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdic-

tion of the two separates is well established to be the middle of the main channel of the stream." Certainly whatever the conflicting claims of the petitioners might be as to bed of the river and the placement of the boundary line, the title to the river bed was not retained by the Government for some yet to be formed state, later called Oklahoma.[10]

The respondents set forth as Appendix 6 and 7 material on pages xii and xiii an early map, apparently by C. C. Royce, which has a solid black line drawn on the north bank of the Arkansas River, as the supposed boundary line of the Cherokee Nation. This map misrepresents the true C. C. Royce map which petitioner has submitted herewith as Petitioner's Exhibit A.[11] C. C. Royce Map, Fifth Annual Report Pl. IX (1884).

Throughout the brief the respondents infer that the petitioner somehow waived its title or that the State of Oklahoma has acquired title by adverse possession *e.g.*, [Oklahoma] "has asserted its ownership actively since statehood on November 16, 1907" (Respondents' Brief at page 4) or "The state has asserted ownership of the mineral resources in the river bed for over sixty years . . ." To set the record straight and to resolve all doubt, the doctrine of adverse possession, laches, has no efficacy

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[10] In appendix F of the Cherokee Brief, the 1886 letter of I.D.C. Atkins, Commissioner of Indian Affairs, was cited to show that at no time did it appear that title to the land beneath the navigable river was held for a future state. Whether the boundary between the Cherokee Nation and the Choctaw-Chickasaw Nations is the south bank, the center line, or the north bank is in dispute.

[11] In any event, it need only be said in passing, whatever the map shows, C. C. Royce is merely a secondary source. The controlling documents are, of course, the treaties and patent which set forth the perimeters of the land conveyed.

against sovereigns such as the petitioner. Accord, *Cherokee Nation v. Georgia,* 30 U.S. [5 Pet.] 1. The petitioner has always had title and the failure to take action sooner should not militate against the rights and title of the Cherokee Nation which were conveyed by the treaties and patent.

CONCLUSION

The respondents have not answered the petitioner's claim of title. Accordingly this Court should reverse the decision of the Court of Appeals.

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Petitioner's Exhibit A

1884 Map by C.C. Royce

Fifth Annual Report, Bureau
of American Ethnology, Smithsonian
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In the
Supreme Court of the United States
OCTOBER TERM, 1969

Nos. 41 and 59

THE CHOCTAW NATION and the CHICKASAW NATION,
Petitioners,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

THE CHEROKEE NATION OR TRIBE OF INDIANS IN OKLAHOMA,
Petitioner,
VERSUS
STATE OF OKLAHOMA, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

The respondents herein present their petition for a rehearing of the above-entitled cause and in support thereof respectfully show:

I.

The majority here overlooked the critical distinction between the law governing navigable water beds and the law governing non-navigable water beds. The decision in Brewer-Elliott upon which the majority opinion placed heavy reliance patently was not based on "essentially similar" facts—and the Court there expressly refused to pass upon the questions presented here.

The majority opinion relied heavily upon *Brewer-Elliott Oil & Gas Co., et al.* v. *United States, et al.*, 260 U.S.

77, 67 L.Ed. 140 (1922). The Court said: "The facts involved in *Brewer-Elliott* were essentially similar to those of the present case." The *Brewer-Elliott* case involved the title to the bed of the Arkansas River where it bounded the Osage Reservation, many miles above the portion of the river with which we are concerned. The Oklahoma Supreme Court in the *Nolegs* case had held that section of the river was navigable. The Supreme Court in the *Brewer-Elliott* case held that section of the river (unlike the lower portion of the river here involved) was *not* navigable and that it was not bound by the Oklahoma Supreme Court decision. The reservation for the Osage Indians was bounded on one side by the "main channel of the Arkansas River." Because the Arkansas at that point was a *non-navigable stream,* the riparian owner took title to the center of the stream even if there had been no reference to the main channel. The *Brewer-Elliott* case thus has no bearing upon the title to the *navigable* water beds with which we are concerned. The Court in *Brewer-Elliott* did, however, mention questions which would arise if the river were navigable, although expressly disclaiming any intention of passing upon those questions. The Court said:

> "*If the Arkansas river were navigable* in fact at the locus in quo, the unrestricted power of the United States, when exclusive sovereign, to part with the bed of such a stream for any purpose, asserted by the circuit court of appeals, would be before us for consideration. If that could not be sustained, *a second question* would arise, whether vesting ownership of the river bed in the Osages was for 'a public purpose appropriate to the objects for which the United States hold territory,' within the language of Mr. Justice Gray in *Shively* v. *Bowlby,* above quoted.

"We do not find it necessary to decide either of these questions, in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river-bed lots here in controversy are.

* * * * * * *

"Voluminous testimony was introduced in the district court upon the issue of navigability. That court considered it all with evident care, and had no difficulty in reaching the conclusion that the Arkansas river, along the Osage Reservation, was not, and had never been, navigable within the adjudged meaning of that term, and that the head of navigation is and was the mouth of the Grand river, near which was Fort Gibson, and this is a number of miles below the Reservation. The circuit court of appeals reviewed this finding and fully concurred in its correctness. Neither the argument nor the record, discloses any ground which can overcome the weight which the findings of two courts must have with us.

"It is a natural inference that *Congress*, in its grant to the Osage Indians in 1872, *made it extend to the main channel of the river, only because it knew it was not navigable.*" (Emphasis ours.)

Thus we see from the Court's language in *Brewer-Elliott* that the facts in that case were not "essentially similar," but really were fundamentally different and consequently reliance upon *Brewer-Elliott* in the majority opinion is misplaced. The reasoning in the majority opinion, therefore, is based upon a false premise and does not support the conclusions which were reached.

II.

The majority's conclusion that "The United States can dispose of lands underlying navigable waters just as it can dispose of other public lands" is contrary to and overrules Shively v. Bowlby, 152 U.S. 1, 38 L.Ed. 331 (1893), and all other pertinent previous and subsequent decisions. Its effect is to reduce the sovereign State of Oklahoma to an unequal and inferior status in relation to her forty-nine sister states.

The conclusion of the majority of the Court obviously is based upon a premise stated on page 13 of its opinion, "Indeed it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands." Where such law has been settled we are unable to determine. This is preceded by a quotation of some loose language by the Court of Appeals in the *Brewer-Elliott* case which is negatived by this Court's refusal in that case to pass on questions concerning navigable water bottoms, as it concluded the stretch of the river with which it was concerned was non-navigable.

In fact, the "well settled" law—at least previous to the present case—was that navigable water bottoms were not acquired by the United States under the Constitution, and that in the territories the United States held the water bottoms in trust for future states, *Pollard* v. *Hagan*, 3 How. 212, 11 L.Ed. 565 (1845); *Martin* v. *The Lessee of Waddell*, 16 Pet. 367, 10 L.Ed. 997 (1842). Under the standards of public policy as analyzed in *Shively* v. *Bowlby*, the United States could *not* dispose of navigable water beds, "just as it can dispose of other public lands," but it could dispose of navigable water beds *only in the case of some international duty or public exigency*. In that case the Court said

Congress had the power to make grants of land below high water mark of navigable waters in any territory *whenever it becomes necessary to do so in order to perform international obligations or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory.* The objects for which the United States holds the territory were defined in *Shively* v. *Bowlby* as follows:

> "And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held *with the object*, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects: and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, 'in trust for the future states.'"

Shively v. *Bowlby* is followed by numerous other decisions on the subject.

This Court has in effect overruled *Shively* v. *Bowlby* since it concludes that the United States can dispose of lands under navigable waters just as it can dispose of other public lands.

III.

The majority's holding as to title to the river bed is completely in conflict with its own finding as shown in the following quotation from its opinion: "Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the river bed."

The above language from the majority opinion should have impelled a decision in favor of the respondents. The public policy of the United States as expressed in the applicable laws and in the decisions of this Court is simply this: The beds of navigable waters during the territorial period are not owned by the United States, but are held in trust for future states. The conveyance of the beds of these waters by the United States will be made only for some compelling reason outweighing this public policy and then only by specific grant clearly stated. *A patent from the United States embracing the navigable water beds does not convey those beds unless it says so in explicit, unmistakable language.* No reservation of the navigable water beds is required to preserve this trust imposed upon the United States for the benefit of all of the people of the United States and of the future states.

To avoid this public policy, the majority of the Court invokes the "Indian Rule" of construction and says that it can infer from the general language of the grants that the navigable water beds are included because of the Indian Rule. We submit that a careful reading of the Indian Rule of construction does not sustain its application here.

The majority invoked as authority *Jones* v. *Meehan*, 175 U.S. 1 (1899), but it failed to consider the full sig-

nificance of that case as explained by Mr. Justice Harlan in *United States* v. *Choctaw Nation*, 179 U.S. 494, 532, 45 L.Ed. 291 (1900), where he said:

> "In *Jones* v. *Meehan*, 175 U.S. 1, 11, 44 L.Ed. 49, 54, 20 Sup. Ct. Rep. 1, it was said that a treaty between the United States and an Indian tribe must be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.
>
> "*But in no case has it been adjudged that the courts could by mere interpretation or in deference to its view as to what was right under all the circumstances, incorporate into an Indian treaty something that was inconsistent with the clear import of its words.* It has never been held that the obvious palpable meaning of the words of an Indian treaty may be disregarded because, in the opinion of the court, that meaning may in a particular transaction work what it would regard as injustice to the Indians. That would be an intrusion upon the domain committed by the Constitution to the political departments of the government.
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> * * * * * * *
>
> "What was said in *The Amiable Isabella*, 6 Wheat. 1, 71, 72, 5 L.ed. 191, 208, is evidently applicable to treaties with Indians. Mr. Justice Story, speaking for the court, said: 'In the first place, *this court does not possess any treaty-making power.* That power belongs by the Constitution to another department of the government, and *to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions.* It would be to make, and not to construe, a treaty. *Neither can this court supply a casus omissus in a treaty, any more than in a law.* We are to find out the intention of the parties by just rules of interpretation applied to

> the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind . . ." (Emphasis ours.)

See also *Choctaw Nation* v. *United States,* 318 U.S. 423, 432, 87 L.Ed. 877 (1943) and *Northwestern Bands of Shoshone Indians* v. *United States,* 324 U.S. 335, 353, 89 L.Ed. 985 (1945).

The majority, in this case, has done that which this Court has always said it would not do. The political contracts between the parties are being re-written. Language is being inserted in the treaties and patents which were never contemplated by the parties, whether United States or Indian. A transfer of the title to navigable water beds is now, at this late date, inserted in the total absence of any clearly expressed intent to do so on the part of the United States. Nowhere, in any of the treaties, or in any of the grants, is there any expression of an intent on the part of the United States to divest itself of the title to these navigable waters.

In their search to find some ground to justify the evasion of the long-standing, historic policy of our government (as proclaimed by statutory and case law) that navigable waters and their beds shall, except in very exceptional instances, be public property, the Justices who joined in the majority opinion have overlooked the most direct and only language of the treaties and patents issued thereunder revealing any expressed intention regarding the navigable portion of the Arkansas River. That language is in the Treaty of Dancing Rabbit Creek (7 Stat. 333, Article XI) and is as follows:

"Navigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U.S."

How can the majority opinion fail to comment upon, even in passing, the fact that the Choctaws, by treaty, were not to be required to pay any higher toll for use of the river than any others? To whom were the tolls to be paid by the Choctaws—to the Choctaws as owners of the river?

IV.

The good intentions of those joining in the majority opinion will not be served by the results of that opinion.

The majority opinion has taken a settled public policy on navigable water beds, grounded in the common law of England, and of the Colonies, and of the United States, and in the early statutory law, long preceding the treaties considered here, and has:

(1) Established a broad, loose construction rule of public grants so far as they pertain to navigable waters, which will haunt the Federal Government and the State Governments from this day forward;

(2) Established the Indian Tribes in a preferred category, which gives them "special rights," as against the public rights of Oklahoma and of the United States, of which they are citizens; and

(3) Opened the door for long and costly litigation between (a) the Cherokees on the one hand, and the Choctaws and Chickasaws, on the other, and possibly also between the Choctaws and the Chickasaws; (b) the prevailing Indian Tribe, or Tribes, and their respective riparian

allottees, or the grantees or assignees of those allottees. (Investigation has disclosed that few of these lands riparian to the Arkansas River now are owned by the Tribes or by individual Indian allottees, or their heirs, or devisees, so the struggle will be largely between the Indian Tribe or Tribes which granted away all of their right, title and interest in this riparian land, with no reservation of the bed of the river, and the present-day grantees of whatever racial stock they may be.)

The State of Oklahoma, since statehood in 1907, has invested revenues derived from leasing the bed of the Arkansas River for the benefit of the common schools of the entire state (not merely for the benefit of two or three Indian Tribes). The children of nearly 40 Indian Tribes now resident within the borders of the State, including the Cherokees, Choctaws and Chickasaws, participate in the benefits of this fund.[1] All are treated equally, whether majority group, or minority group, and without inquiry into their origin. Over 90 per cent of the Indian children in the State of Oklahoma attend the public schools maintained by the State. There are no schools maintained by the Tribes, and very few maintained by the United States, through the Bureau of Indian Affairs, for the education of these Indian children. Nor is there any assurance thus far that any of these Tribes will take any steps to offset this loss to their children, as far as education is concerned. So

[1] Even by 1866, the Quapaw, Peoria, Ottawa, Shawnee, Modoc, Wyandot, Seneca, Osage, Pawnee, Oto, Missouri, Kaw, Tonkawa, Sauk and Fox, Iowa, Kickapoo, Pottawatomie, Cheyenne, Arapaho, Wichita, Caddo, Comanche, Kiowa, Apache, and the Seminole and Creek Indians of the Five Civilized Tribes were settled in what is now Oklahoma, Muriel H. Wright, "A Guide to the Indian Tribes of Oklahoma," page 16.

far as we have been able to ascertain, no part of the huge sums of money the Tribes have recovered to date from the United States for alleged past wrongdoings has been spent to educate their children. Such funds have consistently been distributed to the members of the Tribes on a per capita basis pursuant to Acts of Congress.

The Cherokee, Choctaw and Chickasaw Tribes entered into treaties of allegiance with the Confederate States of America and actively participated on their side in the Civil War. As a result of that action subsequent treaties and agreements brought about considerable modification with respect to their rights and properties, and they were forced to free their slaves.

By the Act of March 3, 1893, 27 Stat. L. 645, Congress created a commission for the purpose of causing the Cherokees, Chickasaws, and Choctaws to relinquish tribal rights and to accept allotment of their lands in severalty to tribal members with the ultimate object of including said lands in a state.[2] The result of this Act and ensuing Acts of Congress were agreements with the Cherokees, 32 Stat. L. 716, and with the Choctaws, and Chickasaws, 30 Stat. L. 495 and 32 Stat. L. 641, which required allotment of the lands to individual members of the respective tribes and relinquishment of the general powers of the tribal governments. These agreements were followed by the Act of April 28, 1904, 33 Stat. L. 573, which supplanted the tribal laws; and the Act of April 26, 1906, 34 Stat. L. 137, continuing tribal governments for limited purposes pending termination at some future time, and for regulation of tribal af-

[2] See "Oklahoma Indian Land Titles" by W. F. Semple, Chap. II and United States Interior Dept., Federal Indian Law 994-999 (1958).

fairs under the Interior Department. The Cherokees and the Choctaws and Chickasaws became citizens of the United States as a result of these Congressional Acts. As citizens of the Territory they voted with other citizens in the elections concerned with admission of Oklahoma to the Union.

It was not until the allotment of the tribal lands in this century to individal members that any fee simple absolute title was acquired by these Indians.

No one questions that the waters under consideration here have been navigable since before the time the instant treaties were entered. Since 1796, as pointed out by the minority opinion, it has been the policy of the United States to reserve the title to navigable waters for the benefit of all the citizens, regardless of their color or creed.

There is no question that the United States had the *power* to dispose of these navigable waters, under the limited circumstances defined in *Shively* v. *Bowlby*, if it saw fit to do so, but the invariable rule has been that such a disposition of the publicly-owned navigable waters would never be presumed; that it must be clearly and unequivocally stated in the grant, to be effective.

The majority states that only the purest of "legal fictions" can be found that a future state was planned in this area. Here again, the majority has overlooked the historical background and legislation from the beginning of the American government up to statehood in 1907.[3]

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[3] Report No. 736, House of Representatives, dated June 27, 1848. Appendix 8 of Respondents' Brief on the merits. Also the statement of Commissioner Schermerhorn to the Cherokees at the Cherokee Treaty Ground in 1835 "that the time will yet come when an Indian state will be added to our Federal Union."

CONCLUSION

The opinions of this Court delivered April 27, 1970, are divided four to three. We file this petition in the earnest belief that at least one Justice who joined in the majority opinion of the seven-man Court will now join the three dissenting Justices to grant the rehearing which we ask.

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted, and that the judgment of the Court of Appeals of the Tenth Circuit be, upon further consideration, affirmed.

Respectfully submitted,

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MAY, 1970

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

The Choctaw Nation and the Chickasaw Nation, Petitioners, v. State of Oklahoma et al.	On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.
41	
The Cherokee Nation or Tribe of Indians in Oklahoma, Petitioner, v. State of Oklahoma et al.	
59	

[April 27, 1970]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases involve a dispute over the title to land underlying the navigable portion of parts of the Arkansas River in the State of Oklahoma. As a practical matter, what is at stake is the ownership of the minerals beneath the river bed and of the dry land created by navigation projects that are narrowing and deepening the river channel.

In December 1966, petitioner Cherokee Nation brought suit in the United States District Court for the Eastern District of Oklahoma against the State of Oklahoma and various corporations to which the State had leased oil and gas and other mineral rights. In its complaint, the Cherokee Nation sought both to recover the royalties derived from the leases and to prevent future interference with its property rights, claiming that it had

been since 1835 the absolute fee owner of certain land below the mean high water level of the Arkansas River. Subsequently, petitioners Choctaw and Chickasaw Nations sought and were granted leave to intervene in the case in order to present their claims that part of the river bed belongs to them.

After pre-trial proceedings in the District Court, a judgment on the pleadings was entered against petitioners and in favor of the State. The District Court held that land grants made to petitioners by the United States conveyed no rights to the bed of the navigable portion of the Arkansas River. The court thus held that title to the river bed remained in the United States until 1907, when it passed to the State upon Oklahoma's admission to the Union. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the judgment of the District Court. 402 F. 2d 739 (1968). We granted certiorari, 394 U. S. 972 (1969), to consider petitioners' claims that they received title to the land in question by treaties with the United States in 1830 and 1835.

I

At the outset, we note that this case requires us to pass upon the effect of treaties that were entered into nearly a century and a half ago. As background, it is necessary briefly to relate the circumstances by which petitioners received large grants of land by treaty from the United States.

The history behind these treaties goes back at least to the period immediately after the Revolutionary War and prior to the adoption of the Constitution—a time when petitioners and other Indian nations occupied much of what is today the southern and southeastern part of the United States. In 1785, in the Treaty of Hopewell, November 28, 1785, 7 Stat. 18, the United

States entered into a treaty of peace and friendship with the Cherokee Indians which established the boundaries of the Cherokee Nation and in which the Indians acknowledged themselves to be under the protection of the United States. The next year, a similar treaty was concluded between the Choctaws and the United States. Treaty of Hopewell, January 3, 1786, 7 Stat. 21.

In following years, the United States entered into a number of additional treaties with both the Cherokees and Choctaws.[1] By means of these treaties, the United States purchased large areas of land from the Indians to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations. Although the Indians were not considered to own the fee title to the land on which they lived, they did have the right to the exclusive use and occupancy of the land—a right that could be ceded only to the United States.[2] Moreover, the Indians continued to live on the land not ceded under their own laws and way of life, and their rights to those lands were "solemnly" guaranteed by the United States. Treaty of Holston, July 2, 1791, 7 Stat. 39, 40; see Indian Intercourse Act of 1802, 2 Stat. 139.

Even while it was making this solemn guarantee, however, the United States adopted a policy aimed at completely extinguishing these Indian Nations' rights to their native lands. The United States had acquired a large western territory in 1803 by the Louisiana Purchase, and it was soon proposed that the Indians be

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[1] *E. g.*, Treaty of October 2, 1798, 7 Stat. 62; Treaty of December 17, 1801, 7 Stat. 66; Treaty of June 7, 1803, 7 Stat. 74.

[2] See *Johnson* v. *McIntosh*, 8 Wheat. 543 (1823); *Fletcher* v. *Peck*, 6 Cranch 87, 142–143 (1810).

relocated on new lands west of the Mississippi.[3] For a time, it seemed that the westward removal of the Indians might be readily accomplished. In the Treaty of July 8, 1817, 7 Stat. 156, the Cherokee Nation agreed to trade part of its lands in Georgia for a large amount of land in the Arkansas Territory. See also Treaty of February 27, 1819, 7 Stat. 195. Thereafter, a number of the Cherokees left their eastern lands and traveled west. Three years later, in the Treaty of Doak's Stand, October 18, 1820, 7 Stat. 210, the Choctaw Nation agreed to exchange approximately half of its remaining Mississippi lands for a large tract of land in the Arkansas Territory and an even larger one further west.

Before the United States could relocate the Indians on these new lands, however, at least part of the land that had been set aside in the Arkansas Territory was already settled. It was apparent that the westward removal had not been aimed far enough west to escape the new nation's expansion. By the Treaty of January 20, 1825, 7 Stat. 234, the Choctaws were pursuaded to cede back to the United States the eastern portion of the land given them in the Treaty of Doak's Stand. Similarly, the Cherokees who had voluntarily moved to Arkansas agreed to move again—further west to a new tract of land, "*a permanent* home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever." Treaty of May 6, 1828, 7 Stat. 311.

The prospect of the voluntary removal of the Indians to land west of the Mississippi soon disappeared. For

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[3] See Act of March 26, 1804, c. 38, § 15, 2 Stat. 289. In 1802, even before it had acquired new lands west of the Mississippi, "the United States agreed to extinguish Indian title within the limits of the States as soon as it could be done 'peaceable [sic] and on reasonable terms.'" U. S. Interior Dept., Federal Indian Law 180–181 (1958).

the most part, the Choctaws and the Cherokees who had not already left their eastern lands refused to give up the land that had long been their home. The abortive attempt to set aside Arkansas Territory land for the Indians justifiably made many of them doubt that the United States would protect them in their new lands. But at the same time the Indians were deciding to remain, the new settlers' expansion and desire for their lands increased. In Georgia, the state legislature, tired of waiting for the United States to fulfill its promise to extinguish Indian rights to Georgia lands,[4] asserted jurisdiction over the Cherokees and prepared to distribute the Cherokee lands. Mississippi soon followed suit, abolishing tribal government and extending its laws to Choctaw territory.

A clash between the obligation of the United States to protect Indian property rights on the one hand and the policy of forcing their relinquishment on the other was inevitable. With the passage of the Indian Removal Act of 1830, 4 Stat. 411, it became apparent that policy would prevail. In spite of the promises to protect the Indians' land and sovereignty, it was clear that the United States was unable or unwilling to prevent the States and their citizens from violating Indian rights.

Thus faced with the prospect of losing both their lands and way of life, the Choctaws agreed in 1830 to leave Mississippi and to move to new lands west of the Arkansas Territory. As a guarantee that they would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it." In addition, the United States pledged itself to secure to the Choctaws the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or

[4] See n. 3, *supra*.

State shall ever have the right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333–334.

The Cherokees were at first determined to retain the Georgia lands on which they had by that time settled down, establishing farms and towns.[5] However, after a time, they, too, were forced to leave. In the Treaty of New Echota, December 29, 1835, 7 Stat. 478, the Cherokees who had remained in the East agreed to leave their lands and to join the Cherokees who had already moved west of the Mississippi. Once again, the United States assured the Indians that they would not be forced to move from their new lands: A patent would issue to convey those lands in fee simple, and they would never be embraced within the boundaries of any State or Territory.

The United States thus succeeded in its efforts to remove the Indians from their eastern lands. In exchange, by the Treaty of Dancing Rabbit Creek with the Choctaws in 1830 and the Treaty of New Echota with the Cherokees in 1835, the United States granted a vast area of its western territory to the two Indian nations. The land thus granted to the Choctaws encompassed what is today approximately the southern third of the State of Oklahoma; to the north, the Cherokees received title to a tract of land in the eastern part of the remainder of the State with a perpetual outlet and other rights in land further west.

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[5] The efforts on behalf of the Cherokees remaining in Georgia included two cases that were brought to this court, *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831), and *Worcester* v. *Georgia*, 6 Pet. 515 (1832). For a recent account of these and other Cherokee efforts, see Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500 (1969). See generally, U. S. Interior Dept., *supra*, n. 3, at 180–200.

Although by later treaties other Indian tribes were settled on parts of the land originally included in these grants, and the Chickasaw Nation was granted an undivided one-fourth interest in the remainder of the Choctaw land, see Treaty of January 17, 1837, 11 Stat. 573; Treaty of June 22, 1855, 11 Stat. 611, the fee simple title to a vast tract of land continued to be held by the petitioner Indian nations for well over half a century.

Then, again due in large part to the pressure of settlers who were encroaching on Indian lands,[6] Congress acted to change the arrangement. By the Act of March 3, 1893, 27 Stat. 645, a commission was created to negotiate with the Indian tribes that had been located in Oklahoma on the allotment of land to their individual members in preparation for the final dissolution of the tribes. Thereafter, the Indians—including the Choctaws, Chickasaws, and Cherokees—agreed to the allotment of their lands and the termination of tribal affairs. See Act of June 28, 1898, 30 Stat. 495; Act of July 1, 1902, 32 Stat. 716. Finally, Congress provided for the disposition of all petitioners' lands with the provision that any remaining tribal property "be held in trust by the United States for the use and benefit of the Indians." Act of April 26, 1906, c. 1876, § 27, 34 Stat. 148. The way was thus paved for Oklahoma's admission to the Union "on an equal footing with the original States," conditioned on its disclaimer of all right and title to lands "owned or held by an Indian, tribe, or nation." Act of June 16, 1906, c. 3335, §§ 3, 4, 34 Stat. 270, 271.

According to petitioners, they received title to the bed of the Arkansas River by treaty and patent from the United States. Because the land was not individ-

[6] See *Marlin* v. *Lewallen*, 276 U. S. 58, 61 (1928); *Choate* v. *Trapp*, 224 U. S. 665, 667–668 (1912).

ually allotted or otherwise disposed of pursuant to the 1906 Act, title remained in petitioners or passed to the United States to be held in trust for them. The State, on the other hand, claims that petitioners never received title to the land. The courts below held in favor of the State, thus disposing of the case since it was undisputed that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood. The sole question for review then is whether the treaty grants from the United States conveyed title to the bed of the Arkansas River to the Cherokee and Choctaw Nations.

II

We move then to the construction and effect of the treaties between petitioners and the United States. At the outset, the State argues that the bed of the Arkansas River was not included in the grants to petitioners even by the accepted standards of ordinary conveyancing since to a skilled draftsman "the land descriptions in the treaties, standing alone, actually exclude the river bed."

Part of the Arkansas River here in question is surrounded on both sides by land granted to the Cherokees, and with regard to it the argument is at the least strained. There is no explicit exclusion of the river bed in the 1835 Treaty of New Echota; in fact, there is no reference at all to the River from "a point where a stone is placed opposite the east or lower bank of the Grand River at its junction with the Arkansas" to its junction with the Canadian. See 7 Stat. 480. As we read the Cherokee treaties and the patent issued thereunder by the President, the Cherokee Nation was granted one undivided tract of land described merely by exterior metes and bounds. That portion of the Arkansas River between its junctions with the Grand and Canadian Rivers lies completely within those metes and bounds, and all of

the land inside those boundaries including the river bed seems clearly encompassed within the grant.

Below its confluence with the Canadian, the Arkansas River forms the boundary between the land granted to the Cherokees to the north and the Choctaws to the south, and the treaties do explicitly refer to this portion of the river. In the Treaty of Doak's Stand in 1820, petitioner Choctaw Nation was granted all the land within the following boundaries:

> "*Beginning on the Arkansas River,* where the lower boundary line of the Cherokees strikes the same; thence *up the Arkansas to the Canadian Fork,* and up the same to its source; thence due South to the Red River; thence down Red River, three miles below the mouth of Little River, which empties itself into Red River on the north side; thence a direct line to the beginning." 7 Stat. 211. (Emphasis added.)

Ten years later, this grant was superseded by the Treaty of Dancing Rabbit Creek, which "varied the description a little and provided for a special patent," *Fleming* v. *McCurtain,* 215 U. S. 56, 59 (1909):

> "*beginning near Fort Smith where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian Fork;* if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the Territory of Arkansas; thence north along that line to the beginning." 7 Stat. 333. (Emphasis added.)

And the patent issued to the Choctaw Nation in 1842 by President Tyler merely repeated the language of this latter treaty.

The Choctaw treaties preceded any grant to the Cherokee Nation; and, under them, petitioners Choctaw and

Chickasaw Nations claim the entire bed of the Arkansas River between its confluence with the Canadian River and the Oklahoma-Arkansas border. The Cherokees, however, also have a claim to this part of the river, based on the language setting out the southern border of the land granted them in the Treaty of New Echota: From a point on the Canadian River,

> "thence down the Canadian to the Arkansas; thence *down the Arkansas* to that point on the Arkansas where the Eastern Choctaw boundary strikes said river . . . ." 7 Stat. 480. (Emphasis added.)

Moreover, they point to the patent issued them by President Van Buren in 1838, which described the southern boundary of their lands as follows:

> "down the Canadian River on its north bank to its junction with Arkansas river; thence *down the main channel of Arkansas river* to the western boundary of the State of Arkansas at the northern extremity of the eastern boundary of the lands of the Choctaws on the south bank of Arkansas river . . . ." (Emphasis added.)

According to the Cherokee Nation, the United States thereby conveyed to them the north half of the Arkansas River from its junction with the Canadian to the eastern Oklahoma border. Petitioners thus are in disagreement about the effect of the words in the treaties and patents with regard to this lower portion of the river.[7]

That disagreement, however, does nothing to make convincing even the State's argument that this part of the river bed was excluded from the grants as a matter of conveyancing law. About all that can be said about the treaties from the standpoint of a skilled draftsman is that they were not skillfully drafted. More important

[7] The courts below did not resolve the dispute between petitioners, and we likewise do not pass on that question.

is the fact that these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, *e. g., Jones* v. *Meehan,* 175 U. S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See *Alaska Pacific Fisheries* v. *United States,* 248 U. S. 78, 89 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws." 7 Stat. 336.

Applying these principles here, we conclude that the entire Arkansas River below its confluence with the Grand River was within the metes and bounds of the treaty grants to petitioners. The State argues that the treaty terms "up the Arkansas" and "down the Arkansas" should be read to mean "along the bank of the Arkansas River." However, the United States was competent to say the "north side" or "bank" of the Arkansas River when that was what it meant, as it had in the 1817 grant to the Cherokees in the Arkansas Territory. See 7 Stat. 158. Even more damaging to the State's argument is the contemporaneous interpretation of the treaty language by the President as reflected in the specific language of the Cherokee patent, "down the Canadian River on its north bank to its junction with Arkansas river; thence *down the main channel of Arkansas river.*" (Emphasis added.) [8] According to the State, the itali-

[8] This construction of the treaty term "down the Arkansas" indicates that at the minimum the boundary of the Choctaws was also the middle of the main channel. Congress was accustomed to

cized part of this description should be read to mean "down the north bank of the main branch of the Arkansas River." However, not only does this reading itself seem to include part of the river bed—that underlying the "secondary" branches—but it also conflicts with this Court's interpretation of the term in *Brewer-Elliot Oil & Gas Co.* v. *United States*, 260 U. S. 77 (1922).

The facts involved in *Brewer-Elliot* were essentially similar to those of the present case. There the United States had established a reservation for the Osage Indians which was bounded on one side by "the main channel of the Arkansas River." 260 U. S., at 81. The United States brought suit to establish the Indians' right to the river bed and the oil reserves beneath it,

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using the terms "up" or "down" the river when designating a navigable river as the boundary between States, see, *e. g.*, Act of March 2, 1819, c. 47, § 2, 3 Stat. 490 (Alabama); Act of February 20, 1811, c. 21, § 1, 2 Stat. 641 (Louisiana), and when it did so, the boundary was set as the middle of the main channel. See *Arkansas* v. *Mississippi*, 250 U. S. 39 (1919); *Iowa* v. *Illinois*, 147 U. S. 1 (1893).

Given this congressional usage, it seems natural for the President, on whose behalf the treaties had been negotiated, to have given the same interpretation to identical language in the analogous situation involving the boundary between petitioners Choctaw and Cherokee Nations, which had long been considered sovereign entities. In fact, this Court recognized the analogy in *Barney* v. *Keokuk*, 94 U. S. 324, 337 (1876), a case involving a grant bounded by the Mississippi River, when it quoted with apparent approval the following language from *Haight* v. *City of Keokuk*, 4 Iowa 199, 213 (1856): "The grant to the [Indians] was to them as persons and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or States, and then the line would have been the *medium filum aquæ*, as it is now between Iowa and Illinois." The grants to petitioners were undoubtedly to them as "a political society," and any "well founded doubt" regarding the boundaries must, of course, be resolved in their favor.

and the State of Oklahoma intervened to claim that the river bed had passed to it at statehood. The case came here after the Court of Appeals had held that "whether the river was navigable or non-navigable, the United States, as the owner of the territory through which the Arkansas flowed before statehood, had the right to dispose of the river bed, and had done so, to the Osages." *Id.*, at 80. This Court held that in the region in question the Arkansas River was non-navigable and that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant *expressly carry the title to that line.*" *Id.*, at 87. (Emphasis added.) The question whether it would have been beyond the power of the United States to make the grant had the river been navigable was reserved for future decision.

In the present case, there is no question that the Arkansas River is navigable below its junction with the Grand River.[9] However, we do not understand the State to argue the question reserved in *Brewer-Elliot*. Indeed, it seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See *Shively* v. *Bowlby*, 152 U. S. 1, 47–48 (1894). Rather, the question is whether the United States intended to convey title to the river bed to petitioners. See *Alaska Pacific Fisheries* v. *United States*, *supra*, 248 U. S., at 87; *Moore* v. *United States*, 157 F. 2d 760, 763 (C. A. 9th Cir. 1946); cf. *Donnelly* v. *United States*, 228 U. S. 243, 259 (1913).

[9] The District Court took judicial notice of the navigability at all relevant times of those portions of the Arkansas River in question, and that issue is not in dispute here. In the *Brewer-Elliot* case, this Court affirmed the finding of the District Court that "the head of navigation is and was the mouth of the Grand River." 260 U. S., at 86.

Turning then to that question, we think it clear, as did the Court of Appeals, that the parties to the treaties and patents did not pause specifically to provide for the ownership of the river bed. According to the State—even if the river bed was within the bounds of the grants to petitioners—we need look no further because "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1925). Even were we limited to the treaties and patents alone, the most specific language of those instruments is identical to that we said "expressly" conveyed title to the river bed in *Brewer-Elliot*. However, nothing in the *Holt State Bank* case or in the policy underlying its rule of construction, see *Shively* v. *Bowlby*, *supra*, 152 U. S., at 49–50, requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor. Indeed, the court in *Holt State Bank* itself examined the circumstances in detail and concluded "the reservation was not intended to effect such a disposal." 270 U. S., at 58. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor.

Together, petitioners were granted fee simple title to a vast tract of land through which the Arkansas River winds its course. The natural inference from those grants is that all the land within their metes and bounds was conveyed, including the banks and bed of rivers. To the extent that the documents speak to the question, they are consistent with and tend to confirm this natural reading. Certainly there was no express ex-

clusion of the bed of the Arkansas River by the United States as there was to other land within the grants.

As a practical matter, reservation of the river bed would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. See *Atlantic & Pacific R. R. Co.* v. *Mingus*, 165 U. S. 413, 435–436 (1897). We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise. Nor do we believe that the United States would intend that it rather than petitioners have title to the dry bed left from avulsive changes of the River's course, which as the District Court noted are common in this area. Indeed, the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce. Cf. *Pollard* v. *Hagan*, 3 How. 212, 229 (1845).

Finally, it must be remembered that the United States accompanied its grants to petitioners with the promise that "no part of the land granted to them shall ever be embraced in any Territory or state." In light of this promise, it is only by the purest of legal fictions that there can be found even a semblance of an understanding (on which Oklahoma necessarily places its principal reliance), that the United States retained title in order to grant it to some future State.

We thus conclude that the United States intended to and did convey title to the bed of the Arkansas River below its junction with the Grand River within the pres-

ent State of Oklahoma in the grants it made to petitioners. The judgments of the Court of Appeals are therefore reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE HARLAN took no part in the consideration or decision of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

The Choctaw Nation and the Chickasaw Nation, Petitioners, v. State of Oklahoma et al. (41)	On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.
The Cherokee Nation or Tribe of Indians in Oklahoma, Petitioner, v. State of Oklahoma et al. (59)	

[April 27, 1970]

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I add a few words.

The Cherokees, pursuant to treaties with the United States, exchanged their aboriginal domain in the East for more than 14,000,000 acres of land west of the Mississippi, then in Indian Territory but now a part of Oklahoma. Pursuant to promises in the treaties, the United States on December 31, 1838, issued a patent to the Cherokees describing the lands by metes and bounds and conveying the lands here in question in fee simple.[1]

A portion of the Arkansas River is entirely within the grant to the Cherokees. It is therefore a mystery why all of the bed in that portion of the river was not conveyed to the Cherokees. The river bed was not reserved to the United States by the patent. The United States,

[1] In addition to the millions of acres conveyed to the Cherokees in fee simple, which included the land surrounding the segment of the Arkansas River here in question, they were guaranteed additional lands to the west of that tract as "a perpetual outlet west" which provided for "free and unmolested use" of those lands.

however, made other reservations: (1) the right to permit other tribes to get salt on the western part of the grant; (2) any rights to lands assigned the Quapaws which turned out to be within the bounds of these Cherokee lands; (3) the right to establish and maintain military posts and roads together with the free use of land, timber, fuel, and materials for the construction and support of those facilities. Since the United States made some reservations but made no reservations of the river bed, and if fair dealing is the standard, one would conclude, I think, that the river bed was the tail that went with the hide.

As respects the Choctaws, another section of the Arkansas River was the boundary between the Choctaw and the Cherokee grants. Whatever may be the rights between the Cherokees and the Choctaws, it seems clear to me that since one portion of the Arkansas was within the exterior boundaries of the Cherokee grants and another portion was within the exterior boundaries of the Choctaw grant, the river bed of each of those segments went to the respective grantees in fee simple.

Here an entire region was conveyed to these tribes as part of their resettlement,[2] with assurances of self-

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[2] The details of the removal of the Cherokees from their ancestral lands are related in *Western Cherokee Indians* v. *United States*, 27 Ct. Cl. 1, 20 *et seq.* While 6,000 had moved west to their new lands by 1838, 18,000 were still in their ancestral homes.

"The Eastern Cherokees were prisoners in Georgia, under the guard of 5,000 United States soldiers, who had hunted them down from their mountains and driven them out of their valleys and were now bringing them to the terms of an enforced emigration." *Id.*, at 20.

They were finally forcibly removed by the U. S. Army under General Scott:

"He moved quickly and successfully, and has thus recorded the most painful experience of his military life:

" 'Food in abundance had been provided at the depots, and wagons accompanied every detachment of troops. The Georgians

government [3] and with pledges that their new homelands would never be part of any State.[4] They were indeed constituted as the sovereign autonomy established in lieu of a prospective State.[5]

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distinguished themselves by their humanity and tenderness. Before the first night thousands—men, women, and children, sick and well—were brought in. Poor creatures. They had obstinately refused to prepare for the removal. Many arrived half starved, but refused the food that was pressed upon them. At length the children, with less pride, gave way, and next their parents. The Georgians were the waiters on the occasion, many of them with flowing tears. The autobiographer has never witnessed a scene of deeper pathos.'" *Id.*, at 23.

For early incidents involving this Court in aspects of the removal problems see James, Andrew Jackson Portrait of a President (1937) pp. 280–281, 304–305. Warren, Supreme Court in U. S. History, Vol. I (1937), c. 19; *Worcester* v. *Georgia*, 6 Pet. 515.

[3] Our agents said the following to the Cherokee Council on July 31, 1837: "Here you are subjected to laws, in the making of which you have no voice; laws which are unsuited to your customs and abhorrent to your ideas of liberty. There, Cherokees, you will make laws for yourselves, and establish such government as in your estimation may be best suited to your condition. There, Cherokees, in your new country you will be far beyond the limits or jurisdiction of any State or Territory. The country will be yours, yours exclusively. No other people can make claim to it, and you will be protected by the vigilant power of the United States against the intrusion of the white man." S. Doc. No. 120, 25th Cong., 2d Sess., 988.

[4] The Treaty with the Cherokees of December 29, 1835, 7 Stat. 478, provided in Article 5 that no lands conveyed shall without the consent of the Cherokees ever "be included within the territorial limits or jurisdiction of any State or Territory." And see Article IV of the Treaty of Sept. 27, 1830, 7 Stat. 333.

[5] The Treaty with the Cherokees of May 5, 1828, 7 Stat. 311, spoke of the desire of the United States to provide the Cherokees "a permanent home, and which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever—a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State."

The title held by these tribes was not the usual aboriginal Indian title of use and occupancy but a fee simple, cf. *United States* v. *Creek Nation*, 295 U. S. 103, terminable if and when these Indian nations ceased to exist or abandoned the territory—conditions not yet occurring. The reliance by the Court of Appeals on *United States* v. *Holt State Bank*, 270 U. S. 49, was therefore misplaced as that case involved only the aboriginal Indian title of use and occupancy. *Id.*, at 58–59.

The United States, speaking through the Solicitor General, has filed a brief *amicus* taking that position in these cases and maintaining it vigorously on oral argument. It concedes, as it must in light of *Shively* v. *Bowlby*, 152 U. S. 1, 49–50, that while the United States holds a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future State, though as stated in *Holt State Bank* that purpose is "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U. S., at 55. Such exceptional circumstances are present here.

The treaties with the present Indians solemnly assured them that these new homelands would never be made part of a State or Territory. So it is reasonable to infer that the United States did not have a plan to hold this river bed in trust for a future State. As the United States says, we would have to indulge "a cynical fiction without any basis in fact" to attribute such a purpose to the parties. Sixty years later, however, Congress was intent in creating a State out of these lands.[6]

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[6] The story of the exploitation of Indians by state and local agencies has been recently summarized by William Brandon:

"Termination is truly a word of ill omen to tribal Indians. Its meaning in Indian affairs is the termination of 'Federal responsi-

Friction between the Indians and the whites who sought to settle on these lands mounted. As time passed the American attitude towards these treaties became as hostile as the opinion below. The Commissioner of Indian Affairs in his 1886 Report spoke of the exploita-

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bility,' the responsibility of the Federal Government to act as trustee for Indian lands, rights, and resources; the responsibility to protect Indian groups in these rights and possessions—protect them particularly against states, counties, cities, or other local powers that might divest them of their rights and possessions—and to provide certain services such as education and health.

"These responsibilities are based upon treaty promises or other equally legal commitments, in which the Federal Government pledged, in return for cessions of value, to render unto specific Indian groups specific rights and their protection, plus the provision of schools, hospitals, sawmills, teachers, doctors, tools and implements, roads, supplies when needed—all the services of the modern world, to be supplied and administered by the Federal Government rather than administered under state and local jurisdictions, because of the well-founded apprehension that state and local jurisdictions might not be trustworthy in carrying out such promises." Progressive, January 1970, p. 38.

Cahn, Our Brother's Keeper (1969), p. 21, states the same theme:

"The Indian knows that termination takes many forms. He can be flooded out of his reservation; he can be relocated; his reservation can be sold out from under him if he cannot meet taxes to which it is subject. His limited power to protect himself on the reservation from local prejudice and discrimination can be wiped away by the substitution of state laws for tribal law, and state jurisdiction for tribal jurisdiction. All of these, the Indian knows, are variants on one basic truth: the United States Government does not keep its promises. Sometimes it breaks them all at once, and sometimes slowly, one at a time. The result is the same—termination. When the Indian is asked to forsake his status under the Bureau in exchange for cash, for promises of technical aid, for public works improvements and industrial developments, he has learned to expect two things:

"*—That the promises will not be kept.*

"*—That even if they should be kept, they will prove inadequate to maintain the Indian at even his reservation level of deprivation.*"

tion of many Indians by a few Indians who had a monopoly of land and he attacked the treaties as such:

> "It is perfectly plain to my mind that the treaties never contemplated the un-American and absurd idea of a separate nationality in our midst, with power as they may choose to organize a government of their own, or not to organize any government nor allow one to be organized, for the one proposition contains the other. These Indians have no right to obstruct civilization and commerce and set up an exclusive claim to self-government, establishing a government within a government, and then expect and claim that the United States shall protect them from all harm, while insisting that it shall not be the ultimate judge as to what is best to be done for them in a political point of view. I repeat, to maintain any such view is to acknowledge a foreign sovereignty, with the right of eminent domain, upon American soil—a theory utterly repugnant to the spirit and genius of our laws, and wholly unwarranted by the Constitution of the United States." H. R. Exec. Doc. No. 1, Pt. 5, 49th Cong., 2d Sess. 87. But cf. the views of Robert L. Owen, U. S. Indian Agent in H. R. Exec. Doc. No. 1, Pt. 5, 50th Cong., 2d Sess. 134–135, 1888 Report, pp. 134–135. And see Debo, The Rise and Fall of the Choctaw Republic (1934), pp. 245 *et seq.*

A commission was created to negotiate an agreement with these tribes superseding the earlier treaties, all as related in *Choote* v. *Trapp*, 224 U. S. 665, 667–670. An agreement was in time reached whereby tribal lands were allotted to individual members of the tribe, with any remaining tribal land passing to the United States as trustees for the Indians. 34 Stat. 137. The bed of the Arkansas was not allotted. The next year—1907—Oklahoma was admitted to the Union on an equal foot-

ing with the original States. 34 Stat. 267. Certainly this cession by the tribes of their interest in the river bed of the Arkansas to the United States in trust for their members was no possible vehicle for transferring that title to Oklahoma.[7]

The Court properly involve these candidates for application of the classical rule that treaties or agreements with Indians are to be construed in their favor, not in favor of commercial interests that repeatedly in our history have sought to exploit them. The idea was perhaps best stated in *United States* v. *Winans*, 198 U. S. 371, 380–381:

> ". . . we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.' 119 U. S. 1; 175 U. S. 1. How the treaty in question was understood may be gathered from the circumstances."

We should therefore resolve any doubts in these cases in favor of these Indians, mindful of what President Jackson said at a meeting with the Choctaws and Chickasaws:

> "Brothers, listen: the only plan by which this can be done, and tranquillity for your people ob-

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[7] The Cherokee Nation claims to have negotiated some 13 sand and gravel leases for the bed of the Arkansas River between April 12, 1883, and May 27, 1893—prior to the admission of Oklahoma into the Union. The record does not disclose the date when the State of Oklahoma first assumed the role of lessor of the river bed. Several cases have involved leases by the State of Oklahoma to the bed of the Arkansas River, though it was prior to the present litigation. See, *e. g.*, *Lynch* v. *Clements*, 263 P. 2d 153.

> tained, is, that you pass across the Mississippi to a country in all respects equal, if not superior, to the one you have. Your great father will give it to you for ever, that it may belong to you and your children while you shall exist as a nation, free from all interruption.
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> . . . . .
>
> "Peace invites you there, annoyance will be left behind; within your limits, no State or territorial authority will be permitted; intruders, traders, and above all, ardent spirits, so destructive to health and morals, will be kept from among you, only as the laws and ordinances of your nation may sanction their admission." S. Doc. No. 512, 23d Cong., 1st Sess., Vol. II, 240–242.

Only the continuation of a regime of discrimination against these people,[8] which long plagued the relations between the races, can now deny them this just claim.

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[8] Sequoyah, the great Cherokee from Tennessee, whose home stood on the banks of the Little Tennessee River, was crippled for life on a hunting trip; and in his inactive life thereafter invented the Cherokee syllabary, inspired by the "talking leaves" or written and printed pages by which the whites communicated. His syllabary contains some 80 syllables in the Cherokee language. His memory is perpetuated in the name of the *genus* of California giant redwoods and his statue placed in Statuary Hall of the National Capitol in 1917.

SUPREME COURT OF THE UNITED STATES

Nos. 41 AND 59.—OCTOBER TERM, 1969

The Choctaw Nation and the Chickasaw Nation, Petitioners, 41 v. State of Oklahoma et al.	On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit.
The Cherokee Nation or Tribe of Indians in Oklahoma, Petitioner, 59 v. State of Oklahoma et al.	

[April 27, 1970]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

At issue in these cases is the ownership of the lands underlying the Arkansas River from its confluence with the Grand River in Oklahoma downstream to the western border of Arkansas. The Arkansas River is a navigable stream below, but not above, its junction with the Grand River. The contending parties are three Indian tribes on the one hand and the State of Oklahoma on the other. The Cherokees base their claim on a United States patent of 1838 and underlying treaties, the Choctaws and the Chickasaws on an 1842 patent also issued in fulfillment of prior treaty commitments. The State claims under the settled doctrine that a newly admitted State takes title to the beds of all navigable rivers within its borders; the State denies that the prior patents conveyed the river bed. The patent to the Cherokees included property on both sides of the Arkansas River from its confluence with the Grand River downstream to its junction with the Canadian River. From the Canadian River to the Arkansas border, the Arkansas River was the boundary

between Cherokee lands on the north side and the Choctaw lands on the south.

According to the Court, the Indians became the owners of all of the river bed from the Grand River to the Arkansas border: the river bed between the Grand River and the Canadian River is Cherokee property because the metes and bounds description of the grant crossed the river without purporting to exclude the river bed; the remaining portion of the river bed is said to be Indian property because by ordinary conveyancing standards the relevant patents and treaties reveal an intent by the United States to convey the river bed to the tribes. I differ with the Court as to both portions of the river bed.

I

As far as riparian rights are concerned—and for other purposes too—the policy and applicable laws of the United States have always distinguished between navigable and nonnavigable streams. Section 931 of Title 43 of the United States Code, Rev. Stat. § 2476, which dates from 1796, does so unmistakably:

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

The owners of land adjacent to a nonnavigable stream own the river bed, but the surveys of public lands stop with the banks of navigable streams; conveyances by the United States of land located on a navigable river carry no interest in the river bed under federal law. *Railroad Company* v. *Schurmeir*, 7 Wall. 272, 288–289 (1869), made the difference very clear:

> ". . . the court does not hesitate to decide, that Congress, in making a distinction between streams

navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways."

Packer v. *Bird*, 137 U. S. 661, 672 (1891), is to like effect. *Shively* v. *Bowlby*, 152 U. S. 1, 49–50 (1894), reemphasized that

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the setlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The issue in *Shively* was whether the grantee of lands along a navigable river in Oregon Territory had an interest in the river bed by reason of his federal grant. It was held that he did not.

In 1845, *Pollard* v. *Hagan*, 3 How. 212, held that the United States had no power, except where state law permitted, to convey an interest in the bed of a navigable river after the State in which it was located had been admitted to the Union. The Court also implied that because the beds of navigable streams were held in trust for future States, the United States was without power to dispose of the beds prior to statehood. This implication was repudiated by statements in such later cases as *Goodtitle* v. *Kibbe*, 9 How. 471, 478 (1850), and *Shively* v. *Bowlby, supra*, at 47–48. In the words of the latter:

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." 152 U. S., at 48.

Nevertheless, whether the United States had only a restricted power to convey interests in navigable river beds prior to statehood was deemed an open question in *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U. S. 77, 85–86 (1922); decision on that question was reserved as was decision on the issue whether, if the power to convey was limited to certain purposes, provision of a home for an Indian tribe came within one of these

permitted purposes. Three years later, *United States* v. *Holt State Bank*, 270 U. S. 49, 55 (1926), again recognized that "the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency."

The ownership of lands under navigable waters was deemed an incident of sovereignty, *Martin* v. *Waddell*, 16 Pet. 367, 409–411 (1842), and whatever the power of the Federal Government to convey such lands lying in its unorganized territories, Congress never undertook to do so by general laws. *Shively* v. *Bowlby, supra*, at 48–50. Conveyance of a river bed would not be implied and would not be found unless the grant "in terms embraces the land under the waters of the stream," *Packer* v. *Bird, supra*, at 672; *Shively* v. *Bowlby, supra*, at 47–48. Such disposals by the United States "during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank, supra*, at 55.

II

Against this doctrinal background, for either the Cherokees, the Choctaws, or the Chickasaws to prevail, there must be found in their grant a "very plain" basis for concluding that the United States intended to convey an interest in the river bed. As I see it, neither the patents nor the treaties here involved satisfy that standard.

The patent to the Choctaws in 1842, which merely quotes from the 1830 Treaty of Dancing Rabbit Creek,

7 Stat. 333, describes the northern boundary of the Choctaw grant as "[b]eginning near fort Smith where the Arkansas boundary crosses the Arkansas river, running thence to the source of the Canadian fork . . . ." An earlier treaty, the 1820 Treaty of Doak's Stand, 7 Stat. 210, described the northern boundary of the Choctaw lands as going "up the Arkansas to the Canadian Fork . . . ." The quoted phrases of the patent (and the Treaty of Dancing Rabbit Creek) and of the Treaty of Doak's Stand are the sole bases for the Choctaw claim to the entire bed of the Arkansas River from the western boundary of Arkansas upstream to the junction with the Canadian River. The Cherokees claim that the conveyance gave the Choctaws only the southern half of the river bed; the State of Oklahoma claims that the northern boundary of the Choctaw lands went up the river on its south bank and hence gave the Choctaws none of the river bed since the river was navigable and there was no express conveyance of the river bed to the Choctaws.

As for the Cherokees, their southern boundary from the Canadian River to the Arkansas border is described in the 1838 patent as proceeding from the north bank of the Canadian River at its junction with the Arkansas River, "thence down the main channel of Arkansas river to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of the Arkansas river . . . ." The patent was in execution of three prior treaties. The 1835 Treaty of New Echota, 7 Stat. 478, in describing the land to be conveyed, repeated the description of the Treaty of February 14, 1833, 7 Stat. 414, which was supplemental to the Treaty of May 6, 1828, 7 Stat. 311. The description in the Treaty of New Echota did not contain the "main channel" language later used in the patent; from the Canadian, the southern

boundary ran "down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river . . . ." The Cherokees claim this language gives them the northern half of the river bed. The Choctaws and the State claim that the Cherokees have no interest in this part of the river bed.

Insofar as the river bed from the Canadian River to the Arkansas border is concerned, the terms of the patents and the treaties are obviously a far cry from what the cases require to evidence the intention of the United States to dispose of lands under a navigable river. But it is said that these cases are irrelevant where the grantee is an Indian tribe and that countervailing considerations require treaties with Indian tribes to be interpreted as the treaties would have been understood by the Indians. Reliance is also placed on the provision in the 1830 Choctaw treaty stating that "wherever well founded doubt shall arise," the treaty shall be construed in favor of the Choctaws. But I find it difficult to conclude from such murky language that the United States intended to reject its historic policy with respect to beds of navigable rivers in executing these treaties and patents. Nor is there any evidence whatsoever that the Indians of that day would have considered the land under a navigable river to be of any utility to them or as being included in a grant of lands adjacent to the river. Indeed, the Treaty of Dancing Rabbit Creek expressly negatives any inference that the United States was sharing with the Choctaws any of its sovereignty over the navigable portion of the Arkansas River. It provided that "[n]avigable streams shall be free to the Choctaws who shall pay no higher toll or duty than citizens of the U. S."

The Cherokee patent recited that the treaty lands had been surveyed and the description in the patent was taken from the survey. Field notes of an 1831 survey

of the eastern Cherokee boundary show unmistakably that the surveyor "fixed, the South East corner of the Cherokee lands" on the north bank of the Arkansas River and that from this point it was "64.50 Ch, to the South bank, where the northern extremity of the Eastern boundary of the Choctaw lands, strikes the Arkansas River."

The Choctaw grant had also been surveyed pursuant to treaties executed prior to the patent. The field notes of an official survey made in 1821 show that the northern point of the eastern boundary of Choctaw territory was on "the south bank of the Arkansas River . . . distance from the Cherokee corner on the north bank of the river, one mile and thirty chains, Arkansas River 630 yards wide," and that the surveyor on "October 4th started from a post on the south side of the Arkansas, opposite the lower boundary of the Cherokees to meander the Arkansas." A plat of another survey of Choctaw lands made in 1825 shows the northern terminus of the eastern Choctaw boundary as being on the south side of the river.

There is little, if anything, in these early surveys to support ownership of the river bed in the Indians. On the contrary, the indications clearly are that downstream from the Canadian River the southern border of the Cherokees' land was on the north side of the Arkansas River and the northern boundary of the Choctaws' land was on the south side.

I find unimpressive the Court's reliance on *Brewer-Elliot Oil & Gas Co.* v. *United States, supra,* for the proposition that because the southern boundary of the Cherokee lands ran "down the main channel of Arkansas river" the northern half of the river bed belonged to the Indians. In *Brewer-Elliott* the Cherokees had ceded certain land to the United States and from that land the United States created a home for the Osage Indians,

"Bounded . . . on the south and west by . . . the main channel of the Arkansas river . . . ." As stated by the Court of Appeals, the central issue was whether the Osage Indians owned "the bed of the Arkansas river north of the thread of the main channel thereof, which was the south boundary of the lands of the Osage Tribe of Indians." 270 F. 100, 101 (C. A. 8th Cir. 1920). The Court of Appeals ruled that the river at that point was not navigable and that "riparian grantees and owners under the acts of Congress and under the law applicable in 1838, 1872, and 1883 at the place where these leased premises lie became the owners of the beds of unnavigable streams to the respective threads thereof. R. S. § 2476 [43 U. S. C. § 931]; *Railroad Co.* v. *Schurmeier* [*sic*], 7 Wall. 272, 287 . . . ." 270 F., at 109. This Court affirmed, pointing out, as was obviously true, that the grant extended "as far as the main channel . . . ." 260 U. S., at 87. Nothing the Court said, however, is any basis for construing a grant to or as far as the main channel of a *navigable* river as an express grant of any lands under that channel.

Much is made of the declarations in the treaties with the Cherokee and Choctaw Nations that the Indian lands would not be included within any State or Territory; it is argued that in view of these declarations the United States had no reason to reserve the river bed. But this is a narrow view of the historic policy of the United States. Navigable rivers in the public domain were a public resource and lands underlying them were not to be conveyed to private hands by the United States. Whether or not it was anticipated that the public domain would be included in a future State, congressional policy, declared early in our history, was that conveyances of public lands bordering on navigable rivers carried no title to the adjoining river bed.

I cannot, therefore, conclude that either the Cherokees or the Choctaws took any interest in the bed of the

Arkansas River, at least from the junction of the Arkansas River and the Canadian River downstream to the Arkansas border.

III

The river bed above the Canadian River is said to be owned by the Cherokees because the tribe was granted lands on both sides of the river pursuant to a single metes and bounds description the calls of which crossed the river without excluding the river bed. It is quite true that if one plots out the conveyance described by the patent the Arkansas River is included within the perimeters of the granted property. But there is no express reference to the river bed, the river was a navigable stream, and the policy of the United States was not to convey lands underlying such waters. No such conveyance should be recognized unless the intention to make such a conveyance was unmistakably stated. No one suggests that the Cherokees were granted full sovereignty over the Arkansas River, that the United States had conveyed away its power to control navigation and commerce on the Arkansas, or that the public had lost its right to travel the navigable portion of the Arkansas by virtue of the conveyance to the Cherokee Nation. There being no indications that the Indians thought one way or the other about the underwater lands or that they had any use for them in those days, the evidence is insufficient to prove an intent on the part of the Government to convey the river bed. Cf. *United States* v. *Holt State Bank, supra.*

Even if it were otherwise, however, the conveyance to the Cherokees was to the Cherokees as a Nation; it created no rights, legal or equitable, in individuals. Cf. *Fleming* v. *McCurtain,* 215 U. S. 56 (1909). If the river bed passed to the tribe, it was to be held by the Nation as property common to all. Moreover, the

Cherokee patent expressly provided "that the lands hereby granted shall revert to the United States, if the said Cherokee Nation becomes extinct, or abandons the same." The Choctaw patent and treaties contained a similar condition. Such provision limited the duration of title and qualified "the absoluteness of the earlier words, 'in fee simple.'" *Fleming* v. *McCurtain, supra,* at 61. The significance of the limitation is that pursuant to agreements reached with the Cherokee, Choctaw, and Chickasaw Nations, Congress early in this century provided for the allotment of tribal lands to individual members of the tribe, terminated the general powers of the tribal governments and continued tribal existence for limited purposes only under the supervision of the Interior Department. See Act of June 28, 1898, c. 517, 30 Stat. 495; Act of July 1, 1902, c. 1375, 32 Stat. 716; Act of April 26, 1906, c. 1876, 34 Stat. 137. Tribal lands for the most part were conveyed to individual Indians or sold. Transfers of lands to individuals along the navigable portion of the Arkansas River neither expressly nor by implication carried with them the river bed. The former Indian territory is not now either occupied or owned solely by Indians but is widely held by diverse peoples and interests in the State of Oklahoma. Should it now be held that the title to the river bed, severed from and no longer serving communal property, remains in the tribe, to be administered or sold by it for purely private purposes? I think not. For the purposes anticipated by the treaties and patents, the Cherokee, Choctaw, and Chickasaw Nations ceased to exist as general governmental entities in 1906. Oklahoma became a State in 1907 and took title to the river bed, which had meanwhile reverted to the United States if title to the river bed had ever been in the Indian Nations.

I would affirm the judgment of the Court of Appeals.